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DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

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ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

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PEECH *v.* BEST AND OTHERS.

C. A.
1930
April 30;
May 1, 26.

[1929. P. 1300.]

Profit à prendre—Exclusive Right of Sporting—Infringement—Rights of Landowner—Reasonable User of Land—Sale of Part of Land—Erection of Buildings—Training Stables.

The owner of a farm containing 700 acres granted to a grantee for a term of fourteen years "the exclusive right of shooting and sporting in over and upon" the said farm, and covenanted that the grantee paying the rent reserved should quietly enjoy the right granted without interruption. While the term of years had still some four years to run the grantor sold 12 acres, part of the 700 acres, to a purchaser who to the knowledge of the grantor intended to use this portion as training stables for race-horses. In pursuance of this intention, immediately after the sale and before the conveyance, the purchaser employed a builder who began to clear the land conveyed and then to erect thereon a house for the purchaser and another for six stable boys, and thirty-six loose boxes for horses. The 12 acres of land were subsequently conveyed to the purchaser. The deed of conveyance made no mention of the grantee's rights, but by a separate deed the grantor covenanted to indemnify the purchaser against claims which had been made by the grantee.

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In an action by the grantee of the sporting rights against the grantor, his purchaser, and the builder :—

Held, that the plaintiff had the exclusive right of shooting and sporting over the 12 acres; that this right had been infringed, and that the plaintiff was entitled to a declaration of his right and damages for its infringement.

APPEAL from the judgment of Avory J. in an action tried before the learned judge without a jury. The facts are particularly stated in the judgment of Scrutton L.J. The following summary indicates the point raised in the appeal.

By an indenture dated July 1, 1921, and made between the defendant, John Thomas Best of Hazeley Farm, Twyford, near Winchester, of the one part and the plaintiff, Samuel Barker Peech of Twyford Lodge, Twyford, aforesaid of the other part the defendant Best demised to the plaintiff the exclusive right of shooting and sporting in over and upon that part of Hazeley Farm comprising about 700 acres and situate on the north of the road leading from Twyford to Morestead and bounded on the east by the road leading from Morestead to Winchester to hold to the plaintiff from March 25, 1920, for the term of fourteen years thence next ensuing determinable by the plaintiff as therein mentioned but subject as regards ground game to the right of the defendant Best under the Ground Game Act, 1880, yielding and paying therefor the yearly rent of 60*l.* payable yearly in advance on March 25 in every year the next yearly payment to become payable on March 25, 1922, and the plaintiff covenanted with the defendant Best his heirs and assigns that he would pay the rent at the time appointed and also all rates payable in respect of the said shooting and sporting rights And also that he the plaintiff would at all times during the said term as far as reasonably possible keep up on (sic) the head of game on the said land and would to the best of his power preserve the eggs and young of game birds from being destroyed or injured And the defendant covenanted with the plaintiff his heirs (sic) and assigns that he or they paying the yearly rent thereby reserved and observing and performing the covenants therein contained on his part should peaceably and quietly have hold and enjoy the rights and privileges thereby demised without any lawful interruption from or by the defendant Best or any person claiming through under or in trust for him And that he the said defendant his heirs and assigns and his and their workmen would take all necessary and reasonable care to preserve the nests eggs and young of all game birds on the said premises and would not unnecessarily disturb the same and that the plaintiff his heirs (sic) and assigns should be at liberty to employ a keeper who should be allowed free access at all times to the said premises for all necessary and proper purposes. The deed also contained a power to the plaintiff to determine the lease at the end of the third, fifth, seventh or tenth year of the term on giving six months' notice.

In July, 1921, when this lease was made, a part of Hazeley Farm containing 12 acres was in the occupation of His Majesty's Principal Secretary of State for the War Department, and formed part of Hazeley Down Camp, but it was expected that this occupation would cease and that the site would soon revert to its former owner, the defendant Best, as it in fact did in December, 1921.

In May, 1929, the defendant Best sold these 12 acres to the defendant Etienne George de Mestre, who was a trainer of horses and who to the knowledge of the defendant Best, intended to use the land as a training ground for race-horses; and immediately after the sale and before the land was conveyed to him the defendant De Mestre, in accordance with plans agreed upon between him and the defendant Reginald Maurice Freemantle, a builder, began to clear the ground for the erection of thirty-six loose boxes for horses, a house for himself and a smaller house for six stable boys. At the date of the trial the horse boxes had been erected and the houses were about to be built.

The plaintiff complained of these acts as being in violation of his right of shooting and sporting under the lease of July 1, 1921, and on June 21, 1929, he brought the present action for a declaration that he was entitled to the exclusive right of shooting and sporting over the 12 acres, an injunction

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restraining the defendants from acting to the prejudice of that right, and damages.

The defendants denied that the plaintiff's rights had been or would be prejudiced by their acts, and while denying all liability they paid ten guineas into Court and said that that sum was enough to satisfy the plaintiff's claim.

By an indenture dated November 30, 1929, which recited that the defendant Best, therein called "the vendor," was seised of the hereditaments therein described—namely, the 12 acres above mentioned—in unincumbered fee simple in possession, and had agreed with the defendant Etienne George de Mestre, therein called "the purchaser," for the sale thereof to him for 600*l*., the defendant Best conveyed to the defendant De Mestre the said 12 acres to hold the same to the defendant De Mestre in fee simple. The indenture reserved to the vendor and his successors in title occupiers of adjoining lands certain rights of way over a road bounding the premises, but it contained no reference to the shooting and sporting rights which had been granted to the plaintiff. By a deed of even date with the conveyance the defendant Best covenanted to indemnify the defendant De Mestre against the plaintiff's claim and all further actions which might be brought against himself or either of the defendants De Mestre and Freemantle for infringement of the plaintiff's sporting rights.

Upon these facts Avory J. granted the declaration as prayed against all the defendants and also gave judgment for the plaintiff for 100*l*. against the defendant Best.

The defendant Best appealed.

A. T. Denning for the appellant. An owner in fee simple who grants a right of shooting and sporting over his land does not by so doing bind himself to keep the land during the period of the grant in the condition in which it was at the commencement of the grant. He may still use his land in the ordinary and accustomed way: *Jeffryes* v. *Evans*, per Erle C.J. (1); per Willes J. (2); *Gearns* v. *Baker* (3);

(1) (1865) 19 C. B. (N. S.) 246, 265.

(2) 19 C. B. (N. S.) 266.

(3) (1875) L. R. 10 Ch. 355.

Caldwell v. *Kilkelly.* (1) If he intentionally interferes with the right he has granted he renders himself liable in an action of trespass: *Jeffryes* v. *Evans*, per Willes J. (2); *Bird* v. *Great Eastern Ry. Co.*, per Erle C.J. (3); *Fitzgerald* v. *Firbank* (4); *Boyle* v. *Holcroft.* (5) But apart from wilful interference with the right granted, the grantor is not liable merely for putting his land to its ordinary use. It cannot be said that to construct two buildings and some loose boxes for horses along what is already a public highway is an unreasonable or unnatural user of a farm of 700 acres. In *Pattisson* v. *Gilford* (6) Jessel M.R. refused to grant an injunction restraining the owner of land from offering it in lots for building purposes after he had granted a right of shooting to the plaintiff. "It does not by any means follow," said the Master of the Rolls (7), "as of necessity that the erection of one or two villas will injure the right of shooting; that depends upon the part of the estate on which the villas are built, the number of villas, and the size of them, and so on. . . . . I should hesitate long before I granted an injunction against a defendant, over whose estate there existed a right of shooting, to prevent his building a single house."

W. Blake Odgers for the respondent. In order that a plaintiff may recover for infringement of his sporting right it is not necessary that he should show any malicious intention on the part of the defendant. It is enough if the defendant's act is such that an infringement of the plaintiff's right is the natural result of it. The act of the defendant in *Fitzgerald* v. *Firbank* (4) in discharging muddy water, after washing gravel, into the river Chess, and so interfering with the plaintiffs' fishing right in the river Colne, was not done with any purpose of interfering with the right, but it was none the less held to be actionable. It must to a large extent be a question of degree whether the user by a landlord of his land, over which he has granted sporting rights, is within

(1) [1905] 1 I. R. 434.
(2) 19 C. B. (N. S.) 266.
(3) (1865) 19 C. B. (N.S.) 268, 283.
(4) [1897] 2 Ch. 96.
(5) [1905] 1 I. R. 245.
(6) (1874) L. R. 18 Eq. 259.
(7) L. R. 18 Eq. 263.

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his rights, or whether he has in a given case overstepped his right as owner of the land and infringed the right of his grantee. In *Dick* v. *Norton* (1) where a landowner, having granted a right of shooting over his land, sold all the timber on the land, Eve J. refused an interlocutory injunction; but at the trial of the action Peterson J. gave judgment for the plaintiff for damages. (2) In so far as the question is one of fact this Court will not overrule the finding of the learned judge.

Denning in reply.

Cur. adv. vult.

May 26. The following written judgments were delivered :—

SCRUTTON L.J. This appeal raises questions of some difficulty and importance as to the nature and extent of a grant of sporting rights, and the acts which will infringe such a grant. Mr. Best was the owner of an estate of nearly 700 acres near Winchester. The land was primarily agricultural land, but during the war a substantial part of it was being used as a camp. After the war the camp was being given up by the War Office, and the huts and road materials on it sold and removed. On July 1, 1921, Best, the landlord, granted to one Peech for a term of fourteen years from March 25, 1920, "the exclusive right of shooting and sporting in over and upon" the land in question. A point was raised at the trial whether part of Best's land, on which acts alleged to be an infringement of the grant of sporting rights had occurred, was part of the land over which the sporting rights were demised. The trial judge found that it was, and I see no ground for dissenting from his decision. The indenture contained a covenant by Peech that he would, during the term, as far as reasonably possible, keep up the head of game on the said land, and would to the best of his power preserve the nests, eggs and young of game birds from being destroyed and injured. There was a covenant by Best for quiet enjoyment, and also that Best would take all necessary and reasonable care to preserve the nests, eggs and young of all game birds on the said premises, and should not unnecessarily disturb the same. Both parties seem to have contemplated the continuance of the practical exercise of sporting rights, which would be academic if there were no game on the land.

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(1) (1916) 85 L. J. (Ch.) 623.

(2) See Redman on Landlord and Tenant, 8th ed. (1924), p. 261.

The occupation by the War Office was expected to cease, and did cease, shortly after the lease. The huts were gradually removed, and the few that remained were in my opinion immaterial to the rights over the piece of land now to be considered.

On November 30, 1929, Best sold to one De Mestre 12 acres of the land the subject of the grant of sporting rights. He knew that De Mestre intended to erect training stables on it, in fact for thirty-six horses, and certain cottages for a caretaker and six stable boys. On the same date Best covenanted to indemnify De Mestre and his builder against any claims by Peech for infringement of Peech's sporting rights. The learned judge finds a substantial interference with Peech's sporting rights since 1926, and assesses the damage at 100*l*. It is said that this is too much, even if the judge was right in treating the sale of the land for that sort of building and use as an infringement of sporting rights. I have considered the arguments and evidence, and do not feel able to interfere with the judge's finding of amount, if he was right in finding Best's action to be an infringement of Peech's sporting rights.

Again, if what De Mestre did and was proposing to do would be an infringement of Peech's sporting rights, Best authorized him to do it, and indemnified him against claims by Peech, and Best would therefore be liable for a breach of his covenant for quiet enjoyment. He would not be liable for De Mestre's action in excess of what he was authorized to do by Best.

This brings one to the real question in the case, which is whether a landlord, who grants sporting rights over his land, can sell part of his land for buildings which will destroy or seriously affect the sporting rights over the land he sells. The authorities are not very easy to understand on this point. Where the landlord leases the land to his tenant, reserving sporting rights, this is really a re-grant by the tenant: *Wickham* v. *Hawker* (1), and in such a case the tenant is usually controlled in the use of his land by the terms of his lease, and cannot sell for building. He may in my opinion use his and in the way in which he is allowed to do by his lease, so long as he acts in good faith and not for the express purpose of destroying the sporting rights he has granted. Willes J. in *Jeffryes* v. *Evans* (2) speaking of a grant of an exclusive right of fishing and sporting over certain land says: "I apprehend that such a grant as that does not prevent the landowner or his tenants from using the land in the ordinary and accustomed way, provided they do not resort to any expedients for destroying or driving away the game." He must not wilfully destroy the game. Erle C.J. in the same case says (3): "If a portion of the land had been sown with turnips or clover, which are favourable to partridges, it would be idle to say that the grantor was guilty of a breach because his tenant in a future year chose to adopt some other mode of cultivation of the land. The same argument applies where thirty or forty acres of furze and underwood out of a farm of 300 acres is cut down for the better cultivation of the farm. If there had been a covenant to keep up the cover, of course it would be a breach of covenant to grub it up." Barton J. said, in the Irish case of *Caldwell* v. *Kilkelly* (4), citing his own decision in *Boyle* v. *Holcroft* (5): "So long as the tenant is bona fide and reasonably managing and cultivating his holding the landlord must (as a general rule) be content to exercise his sporting rights upon the lands as he finds them from time to time. For example, he cannot complain if the tenant in the ordinary course of cultivation drains swampy ground, with the result that snipe depart; or discontinues growing turnips, with the result that partridges disappear." In another Irish case, *Fetherstonhaugh* v. *Hagarty* (1), the tenant, who was allowed to cultivate a certain acreage on which sporting rights had been reserved, was held entitled to stop up rabbit burrows on that acreage, but not on other land which he was not allowed to cultivate. So, in the case of *Boyle* v. *Holcroft* (2) a tenant whose landlord had reserved fishing rights was held not entitled to prevent the exercise of fishing rights by erecting a fence, nominally to keep his cattle out of the river, but really to stop his landlord from fishing from the bank.

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(1) (1840) 7 M. & W. 63.
(2) 19 C. B. (N. S.) 246, 266.
(3) 19 C. B. (N. S.) 265.
(4) [1905] 1 I. R. 434, 447.
(5) [1905] 1 I. R. 245.

The question is simple where the tenant is the grantor of sporting rights, because his use of the land is usually controlled by his lease from the landlord. When the landlord is the grantor to a stranger, the question becomes more difficult, because you have not the help, to control the landlord, of a document other than the grant of sporting rights. There is, however, no doubt of the nature of a grant of sporting rights, which allows the grantee to sport by himself and others and to remove the game. Lord Campbell, in the case of *Ewart* v. *Graham* (3), giving judgment in the House of Lords, after consulting the judges, says: "The nature of the right in question is exceedingly well explained in a learned and lucid judgment pronounced by my noble and learned friend on my left, when a judge of the Court of Exchequer"—that was Lord Wensleydale, formerly Parke B.—"in the case of *Wickham* v. *Hawker*. (4) And from that it appears that this is an interest in the realty which is well known to the law. The property in animals, ferae naturae, while they are on the soil, belongs to the owner of the soil, and he may grant a right to others to come and take them by a grant of hunting, shooting, fowling and so forth; that right may be granted by the owner of the fee simple, and such a grant is a licence of a profit à prendre." The grant of sporting rights is in the same class as the grant of fishing rights, rights of turbary, or rights to cut underwood. The

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(1) (1878) 3 L. R. Ir. 150.
(2) [1905] 1 I. R. 245.
(3) (1859) 7 H. L. C. 331, 334.
(4) 7 M. & W. 63, 75.

Court of Appeal, in *Fitzgerald* v. *Firbank* (1), which related to a grant of an exclusive right of fishing, held that it was a grant of a profit à prendre, and that the grantee could sue in trespass at common law for any infringement of those rights. The defendant in that case, in working gravel pits near a river, turned muddy water into the river, which drove away the fish. His act was not done with the intention, but had the necessary result, of injuring the fish. Lindley L.J. said (2): "The defendant has no right to foul the river to the damage of anybody who has rights in that river," which included the grantee of a profit à prendre. Rigby L.J. (3) said the grantee had the right to sue for a wrongful act which operated as a disturbance of the rights granted by the deed.

This however leaves unanswered the question what is the effect when the person disturbing the right to a profit à prendre is a person doing an act which, unless his grant of a profit à prendre prevents him, he has a right to do as owner of the land affected? Is he derogating from his grant, or is his grant subject to the implied term that he may use his land in an ordinary and legitimate way, so long as he himself does not sport, or himself take the profit à prendre, or wilfully damage the right to the profit à prendre?

On this point the cases are obscure. In *Jeffryes* v. *Evans* (4) and *Bird* v. *Great Eastern Ry. Co.* (5) the question did not directly arise. In *Jeffryes* v. *Evans* (4) the landlord had demised a farm to a tenant, B, reserving to himself all timber and the exclusive right of shooting and sporting. He also granted to C a house and the exclusive right of shooting and sporting over and taking game and rabbits upon land, including the farm demised to B; but he reserved to himself all trees, underwood, thorns and bushes. The tenant B shot the rabbits, as injurious to his cultivation, and cut down the furze covers. C, instead of suing B for unlawfully injuring his profit à prendre, as under the authority of *Fitzgerald* v. *Firbank* (1) he would be entitled

(1) [1897] 2 Ch. 96.
(2) Ibid. 102.
(3) [1897] 2 Ch. 104.
(4) 19 C. B. (N. S.) 246.
(5) 19 C. B. (N. S.) 268.

to do, sued the landlord for breach of his covenant of quiet enjoyment. C failed, for it was held that B, as against the landlord, was not entitled to do what he did in respect of the rabbits, and therefore the landlord was not liable for his acts. Erle C.J. held, as to the furze covers, that the grantee of sporting rights over a farm was not entitled to complain of covers cut down "for the better cultivation of the farm." "The plaintiff," said the Chief Justice (1), "has just as much right to shoot and sport over the thirty or forty acres of land which has been so treated as he had before: and that is all the plaintiff covenanted that he should have." Willes J. used the passage cited above and said (2): "Cutting furze and underwood in the ordinary course of the cultivation of the land, cannot be said to be a wilful destruction of the game." Montague Smith J. said (3): "He had the same right to sport over the land as before. If he wished to have the condition of the land as to furze and underwood preserved, he should have expressly stipulated that the present mode of cultivation of the land should not be altered." The question of a fundamental alteration of the use of the land which entirely destroys the profit à prendre, does not seem to have arisen.

In *Bird* v. *Great Eastern Ry. Co.* (3) the plaintiff had a letting not under seal for three years of the exclusive right of shooting over certain land. A railway was constructed across the land, and the plaintiff claimed compensation under the Lands Clauses Act, 1845, from the railway company. One ground of defence was, before the fusion of law and equity, that the plaintiff having no grant under seal had no interest in the land, entitling him to compensation. This succeeded; it would not do so since the fusion of law and equity. Erle C.J. doubted whether, if the letting were under seal, it would make any difference. This seems contrary to the later views of Lord Watson and Lord Bramwell in *Great Western Ry. Co.* v. *Swindon and Cheltenham Ry. Co.* (4) Erle C.J. expresses himself thus (5): "He takes by his

(1) 19 C. B. (N. S.) 265.

(2) Ibid. 266, 267.

(3) Ibid. 268.

(4) (1884) 9 App. Cas. 787, 803, 808.

(5) 19 C. B. (N. S.) 283.

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contract the right of shooting if there be game, and of fishing if there be fish. But there is no contract on the part of the landlord to keep up the quantity of game or of fish. No doubt an action would lie against Elwes, if, after having let the right of shooting and fishing, he wilfully did something to destroy the fish or to prevent the access of the game to the land." Willes J. treats the matter as a mere licence, and says (1): "The owner of the land has not contracted that he will not enjoy the land in any lawful and ordinary way which does not go directly to the destruction of the game." Then: "The books are wholly silent as to one who has a mere licence to shoot or to fish over another man's land, having any right to restrain the owner of the soil in the ordinary and reasonable use of it; always excepting the malicious or intentional destruction or driving off of the game." Byles and Montague Smith JJ. say the plaintiff had no interest in the land. Again, the question of profit à prendre, and the question of a use of the land destroying the profit à prendre is not discussed.

In *Pattisson* v. *Gilford* (2) the question of building on the land did arise. Jessel M.R. refused to grant an injunction restraining a landlord who had granted a right of shooting over land from advertising for sale the land described as "several plots of building land," with a statement that it was sold subject to shooting rights. But he said he would have granted it if the defendants had been going to grub up the plantations, but that in the circumstances it was not shown that damage to the shooting rights would inevitably follow, or that the purchasers would build. I think he would have granted an injunction if the landlord had threatened to build over the whole estate. He says (3): "All these observations would apply if the defendant were actually threatening to erect villas. It does not by any means follow as of necessity that the erection of one or two villas will injure the right of shooting; that depends upon the part of the estate on which the villas are built, the number of villas, and

(1) 19 C. B. (N. S.) 284.
(2) L. R. 18 Eq. 259.
(3) L. R. 18 Eq. 263.

the size of them, and so on. There may or may not be injury, and I should hesitate long before I granted an injunction against a defendant, over whose estate there existed a right of shooting, to prevent his building a single house. Of course a great deal would depend on the extent of the property, and the nature of the coverts, and so on; but I should require to be satisfied, according to the authorities, that by the erection of a house, or even two houses if the estate was a large one, injury must necessarily and inevitably follow." He does not mention the profit à prendre, but I think he would have restrained a different use of the land, which was a farm when the rights were leased, which substantially destroyed the profit à prendre.

In *Gearns* v. *Baker* (1) the landlord, who had granted shooting rights over 1300 acres, proposed to cut down some of the coverts on the land and sell the timber. James and Mellish L.JJ. refused to restrain this as an infringement of a mere grant of shooting rights. James L.J. said (2): "It is preposterous to suppose that a man who grants a shooting lease for 21 years is to be dictated to by this Court as to whether he shall cut down a tree or remove a coppice, because by so doing he would be driving away the hares or interfering with the breeding of the pheasants. If men mean to acquire such rights, they must express their meaning clearly. I am of opinion that such rights are not expressed and not implied in the ordinary grant of shooting, and that this Court has no right to interfere in the way suggested. As this case stands, it is the common case of a man who has granted the right of shooting, and is minded to deal with his estate as other landowners deal with their estates, and I am of opinion that there is no right or power in this Court to interfere with him in so dealing." Mellish L.J. (3) treated it as cutting the trees in the ordinary course of managing the estate, but added: "It is unnecessary to consider whether he could turn the covers into pasture or arable land, because he is not proposing to do anything of the kind."

(1) L. R. 10 Ch. 355.

(2) L. R. 10 Ch. 357.

(3) L. R. 10 Ch. 358.

In *Dick* v. *Norton* (1), where a landlord, who had granted shooting rights over his farms, reserving to himself the right to enter the coverts at any reasonable time consistent with the non-disturbance of game for the purpose of felling trees, then sold the timber on the farm for munition purposes. Eve J. refused to grant an interlocutory injunction, partly on the ground, following *Gearns* v. *Baker* (2), that the lessor had the right to turn his property to the best advantage for which it was suited, partly on the ground that if there was any right it was rather a case for damages than for an injunction. But it appears (3) that at the trial of the action Peterson J. gave the plaintiff damages, presumably on the ground that cutting down all the timber was a substantial interference with the profit à prendre going beyond the ordinary cultivation of the farm. In *Farrer* v. *Nelson* (4) a sporting tenant who brought an unreasonable number of pheasants on the land which injured the crops was held liable in damages. This apparently shows that both landlord and sporting tenant must use their land reasonably having regard to the interest of the other, and will be liable for damage caused to the other by extraordinary, non-natural, or unreasonable action.

I test the case in this way. May a landlord who grants sporting rights over a farm for valuable consideration, turn the whole farm into building land ? I think Jessel M.R. would have stopped him : *Pattisson* v. *Gilford.* (5) On the other hand, *Gearns* v. *Baker* (2) shows that the landlord could not be interfered with in cultivating the farm in the ordinary way and changing its cultivation in the ordinary way, though it lessened the amount of game, or the sporting amenities. What is the difference ? It appears to me that fundamentally changing the character of the land over which sporting rights are granted, though it is not with the deliberate intention of injuring the sporting rights, and though it is a thing which a landowner would have power to do if he does not injure the rights of others, if it has the necessary effect of substantially injuring the rights of others is derogation from the grant, and is a substantial interference with the profit à prendre granted. If this is true of building affecting the whole land, or cutting down all the timber on the land for sale: see per Eve J. in *Dick* v. *Norton* (1), it appears to me to be true of partial changes in the land, provided they substantially injure the rights granted.

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(1) 85 L. J. (Ch.) 623.

(2) L. R. 10 Ch. 355.

(3) Ex relatione J. H. Redman who was counsel in the case. See Redman on Landlord and Tenant, 8th ed., p. 261.

(4) (1885) 15 Q. B. D. 258.

(5) L. R. 18 Eq. 259.

In the present case a farmer has sold a substantial part of the land over which sporting rights are granted for the purpose of erecting a training stable for thirty-six horses with cottages for attendant stable boys and caretakers. The judge has found that this substantially affects the sporting rights. I should doubt myself, when the stables for thirty-six horses and the six stable boys are in occupation, whether a game bird would be left within a quarter of a mile of the stables. In my opinion this is a derogation from the grant, and an infringement of the rights of profit à prendre, and a breach of the covenant of quiet enjoyment, and the plaintiff is entitled to the damages awarded. The appeal should be dismissed with costs.

GREER L.J. By a lease under seal dated July 1, 1921, the defendant, who was the owner of Hazeley Farm, Twyford, and was in possession of the farm, except as to a certain part which was then occupied by the Crown for the purposes of a military camp, granted to the plaintiff exclusive shooting rights over part of the farm. The lease of the shooting rights included some of the land which was still in the occupation of the Crown at the date of the lease, but which both parties expected would soon revert to the lessor and be again used as farming land. There were certain buildings on part of the land, the subject-matter of the lease, and, in addition, on that part which was, as hereinafter mentioned, sold to a Mr. De Mestre, there were roads and trenches. Notices to quit had been received from the Crown and, as I have said,

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(1) 85 L. J. (Ch.) 623.

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it was anticipated at the date of the lease that the land would, in the near future, be again used for farming purposes. I think, therefore, we must treat the lease of the shooting rights as a lease of shooting rights over farm land though, of course, the lessee could not complain of any interference caused by the existence of the buildings, roads and trenches on part of the farm.

On November 30, 1929, the defendant conveyed to Mr. De Mestre 12 acres of the farm, the major part of which had been in the occupation of the Crown, with the knowledge that the purchaser intended to use the land to erect thereon racing stables and bungalows and other buildings to accommodate men or boys to look after the stables and the horses. He also entered into a deed of covenant on the same date indemnifying the purchaser against the claim brought against him in the present action; the purchaser having started to build a stable consisting of a number of loose boxes for race-horses. After the purchase but before the conveyance, the plaintiff brought this action against the lessor J. T. Best, De Mestre, and the builder, claiming an injunction restraining the defendants from doing any acts calculated to deprive the plaintiff of the shooting rights given by his lease, and damages. In the course of the action the plaintiff asked for an interlocutory injunction which was refused. When the action came on for trial it was still an action for an injunction, notwithstanding the fact that the plaintiff's counsel did not think it worth while to press for an injunction, but asked for damages instead. It was, at one time, thought that, where damages were claimed, it was necessary to establish that, at the date of the writ, the plaintiff's rights had in fact been invaded, and that in a quia timet action, where nothing was proved except a threat which, if carried out, would amount to a breach of the plaintiff's rights, damages could not be given. It was, however, finally decided by the House of Lords in *Leeds Industrial Co-operative Society* v. *Slack* (1) that by reason of Lord Cairns' Act (21 & 22 Vict. c. 27) in a proper case damages can be

(1) [1924] A. C. 851.

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given to compensate for the injury which will be done to the plaintiff from the carrying into effect of the threat. The law applicable to the matter is thus stated by Lord Finlay (1): "In my opinion this question must be answered in the affirmative. The power given is to award damages to the party injured, either in addition to or in substitution for an injunction. If the damages are given in addition to the injunction they are to compensate for the injury which has been done and the injunction will prevent its continuance or repetition. But if damages are given in substitution for an injunction they must necessarily cover not only injury already sustained but also injury that would be inflicted in the future by the commission of the act threatened. If no injury has yet been sustained the damages will be solely in respect of the damage to be sustained in the future by injuries which the injunction, if granted, would have prevented."

In the present appeal it was contended on behalf of the appellant that the plaintiff was not entitled to complain of the building of the stables on the ground that the grant of shooting rights by a deed which contained a covenant for quiet enjoyment does not take away from the grantor the right to use his land during the period covered by the grant in the ordinary and usual ways in which landowners may deal with the land for their own purposes, and that the building of a stable was an ordinary and normal use of the land by the landlord, and that the plaintiff was, therefore, neither entitled to an injunction nor to damages. It was also contended that, in any event, the damages were excessive.

As regards the first point I have come to the conclusion that there was implied in the conduct of the defendants Best and De Mestre a threat to put the 12 acres to uses which would have entirely prevented the exercise of sporting rights over that particular part of the farm. The plaintiff had, by his lease, acquired a right which is a profit à prendre, an incorporeal hereditament, a right in rem which he was entitled to protect from injury either by his lessor or a third party: see *Fitzgerald* v. *Firbank.* (1) Though the mere building of a stable might not have been, in itself, a breach of the plaintiff's rights under his lease, I am of opinion that a complete ouster of the plaintiff from exercising his rights over a definite part of the land would be such a breach as, if threatened, would entitle him to an injunction, and he was, therefore, entitled to have damages granted in lieu of an injunction upon the hypothesis that, as no injunction was granted, the defendants would carry out their threat. I agree with the contention that a covenant for quiet enjoyment does not, without express words, enlarge the subject-matter of the grant. It is a covenant for quiet enjoyment of that which is granted in the operative part of the grant: see *Leech* v. *Schweder.* (2) But in construing the grant the Court must have regard to the character of the land at the date of the grant. I can quite understand that a grant of sporting rights over land which had already been partly developed as building land would not prevent the owner from going on with his plans and building houses from time to time; but I regard the lease of sporting rights in this case as a lease of rights over farm lands. Though such a grant would not operate to restrain the landlord from interfering with the sporting rights by carrying out any reasonable and normal operations which might be deemed advisable for the purpose of dealing with the land to the best advantage as farming land, he would have no right to put the land to uses which have nothing to do with farming requirements, so as to oust entirely the sporting tenant from exercising his rights over a substantial part of the land included in the grant.

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(1) [1924] A. C. 857.

I do not think that the authorities relied on by the appellant: *Jeffryes* v. *Evans* (3); *Gearns* v. *Baker* (4); *Dick* v. *Norton* (5); and *Bird* v. *Great Eastern Ry. Co.* (6) are inconsistent with this view of the law. It is true that the language used by Willes J. in *Bird* v. *Great Eastern Ry. Co.* (1) seems to indicate, if literally interpreted, that that learned judge held the opinion that nothing short of malicious or intentional destruction or driving off all the game would amount to a breach of sporting rights even when granted by deed. I do not think that that learned judge meant to go as far as that. I think his reference to malicious and intentional destruction can only be treated as an illustration of one way in which the rights of the sporting tenant could be interfered with so as to give him a cause of action and that it was not intended to be exhaustive. In any case the observations of the learned judge were obiter, and, though entitled to great weight, they are not binding on this Court. In my judgment, what the defendants were threatening to do by their conduct, if not restrained by injunction, was to entirely prevent the plaintiff from exercising any shooting rights over 12 acres of the land over which his lease gave him shooting rights and, I think, also to damage to some extent his shooting rights beyond that area by frightening the birds away. I think this would have derogated from the incorporeal hereditament which had been granted to the plaintiff, that it would have been a breach of the covenant for quiet enjoyment, and therefore that a good case was made by the plaintiff for an injunction or, if the Court decided to give damages in place of an injunction, a good case for damages which would be a sufficient substitute for the injunction to which he would otherwise have been entitled. I cannot find that the damages granted by Avory J. were excessive when regarded as damages estimated not merely on the basis of what had been done on the land at the date of the sale of the 12 acres, but estimated as a substitute for injunction.

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(1) [1897] 2 Ch. 96.
(2) (1874) L. R. 9 Ch. 463.
(3) 19 C. B. (N. S.) 246.
(4) L. R. 10 Ch. 355.
(5) 85 L. J. (Ch.) 623.
(6) 19 C. B. (N. S.) 268.

For these reasons, though at one time I was inclined to take a different view, I have, after considering the decision in *Leeds Industrial Co-operative Society* v. *Slack* (2), come to the conclusion that this appeal should be dismissed.

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(1) 19 C. B. (N. S.) 268, 284.

(2) [1924] A. C. 851.

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SLESSER L.J. By an indenture dated July 1, 1921, John Thomas Best, one of the defendants in this action, demised to Samuel Barker Peech, the plaintiff, the exclusive right of shooting and sporting in, over and upon part of Hazeley Farm, Twyford, Hampshire, comprising about 700 acres, from March 25, for the term of fourteen years subject to six months' previous notice in writing to determine by the plaintiff at the end of the third, fifth, seventh or tenth years of the term. The yearly rental was 60*l.* payable in advance by the plaintiff, and the plaintiff covenanted, so far as reasonably possible, to keep up the head of game upon the land and to the best of his power to preserve the nests, eggs and young of all game birds from being destroyed or injured. The landlord Best covenanted that Peech should peaceably and quietly have hold and enjoy the property and, further, that he and his agents would take all necessary and reasonable care to preserve the nests, eggs and young of all game birds on the said premises and not unnecessarily disturb the same. Peech was to be at liberty to employ keepers who were to be allowed free access at all times to the said premises for all necessary and proper purposes.

Notwithstanding this lease of shooting rights, the defendant Best, on November 30, 1929, conveyed to one Etienne George de Mestre a parcel of land of about 12 acres which, the plaintiff contends, is a part of the area demised to him in 1921 for shooting and sporting rights as above stated. In the conveyance of November 30, 1929, the vendor is described as seised of the hereditaments in unincumbered fee simple, but by a collateral covenant of the same date it is recited that whereas Best has agreed to sell to De Mestre the 12 acres in question, and whereas Peech has started an action against Best, De Mestre, and a Mr. Freemantle, a builder employed by De Mestre, Best, in consideration of the completion of the purchase of the land by De Mestre, indemnifies De Mestre in respect of the action of Peech.

This present action between Peech and Best and others claiming a declaration that the plaintiff Peech has the exclusive right of shooting and sporting upon and over the

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land demised to him, and claiming damages, was heard before Avory J., who found that the erection of thirty-six loose boxes by De Mestre, the purchaser of the 12 acres, to be occupied by horses (which will be trained on the ground) appeared to him to be entirely inconsistent with the grant of the shooting right and in fact amounted to a physical obstruction of the plaintiff in the exercise of his shooting right. He came to the conclusion that the portion which has been sold and converted into a racing stable, though not of much value from a shooting point of view, was of some value, and he awarded the plaintiff 100*l*. damages against the defendant Best, this 100*l*. to compensate for the infringement of the plaintiff's rights which had thus taken place; the learned judge saying: "Judgment for 100*l*. damages which I say covers the damage already done." He also granted a declaration that the plaintiff was entitled to the sporting rights over the land sold to De Mestre.

From the authorities it would appear that injury to shooting rights arising from the ordinary management of land is not an injury of which the shooting tenant can complain. In *Gearns* v. *Baker* (1) it was held that a landowner who has demised the right of shooting is not prevented from cutting timber as he thinks fit in the ordinary management of his land although injurious to the shooting. James L.J. said (2), speaking of ordinary grants of shooting: "It is the common case of a man who has granted the right of shooting, and is minded to deal with his estate as other landowners deal with their estates, and I am of opinion that there is no right or power in this Court to interfere with him in so dealing." Mellish L.J. said (3): "In my opinion, the right of shooting is a right to shoot over the lands as the lands may happen to be at the time, the landlord, of course, not doing anything for the express purpose of injuring the right of shooting." He, however, continues: "It is unnecessary to consider whether he could turn the covers into pasture or arable land, because he is not proposing to

(1) L. R. 10 Ch. 355.
(2) L. R. 10 Ch. 357.
(3) L. R. 10 Ch. 358.

do anything of the kind." This case is thus clear authority for the proposition that were Mr. Best or Mr. De Mestre, the assign, to do something which landowners reasonably do in dealing with their estates, there could be no complaint by the shooting tenant. This principle has been applied also to a failure to do that which may be necessary to preserve the shooting. In *Patrick* v. *Harris* (1) it was held that under a lease with a right of shooting, there is no implied obligation upon the landlord to keep the fences around the plantations in such a state of repair as to be effectual to exclude live stock. The Lord President said (2): "A person taking a shooting over such a small estate takes it as he finds it, and in the absence of express obligation, I think it would not only be novel, but also unreasonable, to hold that the landlord was subject to such an implied obligation." Lord Adam said (3): "No doubt if the landlord cuts down wood in the plantations and drags it away, that may injure the shooting. But he will be entitled to do that apart from special stipulation to the contrary." In *Jeffryes* v. *Evans* (4) it was argued that a covenant for quiet enjoyment in a shooting lease was impliedly a covenant not to grub up furze or underwood. Erle C.J. said (5): "The plaintiff has just as much right to shoot and sport over the thirty or forty acres of land which has been so treated as he had before; and that is all the plaintiff covenanted that he should have." Montague Smith J. said (6): "He had the same right to sport over the land as before. If he wished to have the condition of the land as to furze and underwood preserved, he should have expressly stipulated that the present mode of cultivation of the land should not be altered." The destroying of rabbits by the tenant, the necessary result of proper tillage or culture, in a lease reserving to the lessor all rabbits, with full liberty to destroy them, is lawful: *Fetherstonhaugh* v. *Hagarty*. (7) So also the cutting and keeping down weeds in a river where the landlord has reserved the exclusive right of fishing: *Caldwell* v. *Kilkelly.* (1) Nor does the landlord guarantee a supply of game. In *Bird* v. *Great Eastern Ry. Co.* (2) Erle C.J. speaking of shooting rights said: "He takes by his contract the right of shooting if there be game. . . . . But there is no contract on the part of the landlord to keep up the quantity of game."

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(1) (1904) 6 F. 985.]

(2) 6 F. 987.

(3) 6 F. 988.

(4) 19 C. B. (N. S.) 246.

(5) 19 C. B. (N. S.) 265.

(6) 19 C. B. (N. S.) 268.

(7) 3 L. R. Ir. 150.

On the other hand, on a covenant for quiet enjoyment, if the facts show that the act of the landlord goes beyond what is reasonable in the management of his estate, or in effect deprives the tenant of that which he bargained for under the covenant for quiet enjoyment, notwithstanding certain dicta (such as those of Mellish L.J. in *Gearns* v. *Baker* (3) and Willes J. in *Jeffryes* v. *Evans* (4), that the landlord is only liable on the covenant when he intentionally injures the shooting rights), I think that if such injury is the reasonable result of his action the tenant can complain. The rule that a lessor may not derogate from his grant applies to profits à prendre as well as to corporeal hereditaments, and the lessor of shooting rights must not do that which would annihilate the rights which he has granted: *Fitzgerald* v. *Firbank.* (5) In *Pattisson* v. *Gilford* (6) on a motion for injunction to restrain the owner of a shooting estate from issuing particulars of sale of the estate in lots, stating that the land was suitable for villas and that residences might be erected on part of it, but giving full notice of the right of shooting, the injunction was refused, but Jessel M.R. said: "No cautious man who understood the particulars would buy that land for immediate building purposes; he would see the difficulty which he would get into with regard to the owner of the right of shooting." There are indications in the case that had the lots actually been built upon it may have been that an action would lie.

(1) [1905] 1 I. R. 434.

(2) 19 C. B. (N. S.) 268, 283.

(3) L. R. 10 Ch. 355, 358.

(4) 19 C. B. (N. S.) 266. See also by the same learned judge in *Bird* v. *Great Eastern Ry. Co.* 19 C. B. (N. S.) 268, 284.

(5) [1897] 2 Ch. 96.

(6) L. R. 18 Eq. 259, 264.

In *Jeffryes* v. *Evans* (1) Willes J. said: "I apprehend that such a grant as that does not prevent the landowner or his tenants from using the land in the ordinary and accustomed way, provided they do not resort to any expedients for destroying or driving away the game." As I have already indicated, I read the words "resort to any expedients" to include action which must necessarily have the same result. In *Dick* v. *Norton* (2), a case of sale of timber not for estate management but for commercial purposes, Eve J. refused an interlocutory injunction, but, on the trial, Peterson J. gave damages: see Redman, Landlord and Tenant, 8th ed., p. 261. See also *Boyle* v. *Holcroft* (3) to the like effect.

In the present case the learned judge, having heard the evidence, has come to the conclusion that the plaintiff has suffered damage from the physical obstruction of the shooting rights. He has not found, nor indeed was it seriously suggested, that the use of the land for racing stables was in any way reasonably necessary or at all connected with the farm management. I think this is a case where the injury done cannot be said to fall within the principle of *Gearns* v. *Baker* (4), and that what was done was not for the management of the land; rather does the case resemble *Dick* v. *Norton* (2), where the timber was felled solely for mercantile purposes, in which case damages were given by an experienced Chancery judge. It is said that the learned judge should have considered only what had already been done, which is the erection of buildings. The learned judge here has apparently confined the damages to the injury already done, but I read him to have given them in lieu of the injunction claimed for breach of covenant, and in that case damages can be given in respect of the injury which would have been prevented by the injunction if granted: per Lord Finlay in *Leeds Industrial Co-operative Society* v. *Slack* (5); Mayne on Damages, 10th ed. (1927), ch. xxvii., pp. 592 et seq.

(1) 19 C. B. (N. S.) 246, 266.
(2) 85 L. J. (Ch.) 623.
(3) [1905] 1 I. R. 245.
(4) L. R. 10 Ch. 355.
(5) [1924] A. C. 851, 857.

For these reasons I think that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Cunliffes, Blake & Mossman, for White & Nash, Winchester.*

Solicitors for respondent: *Petch & Co., for Reginald J. Harris, Winchester.*

W. H. G.

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May 14, 16, 19, 20;
June 2.

[1930. L. 405.]

Poor Law—Property—Transfer—" Property . . . . for which special provision is made "—" Parish property "—Fund realized on Sale of Infirmary—Which Authority entitled to Proceeds—Local Government Act, 1929 (19 *Geo.* 5, *c.* 17), *ss.* 113, 115, *Schedule IX.*

A poor law institution or infirmary formerly belonged to the East London Union. That Union was dissolved in 1869, and the parishes comprised in it were added to the City of London Union. In 1871 the Guardians of the last mentioned Union bought the institution from the persons in whom it was vested. Pursuant to orders made by the Minister of Health in 1921 the said Guardians sold the institution and invested the purchase money in War Loan stock. After the passing of the Local Government Act, 1929:—

Held (1.), that that stock was not " parish property " within the meaning of s. 115 of that Act, which on the appointed day vested in the Common Council of the City of London under that section, but was property held by the Guardians under s. 113, which on that day vested in the London County Council; and (2.) that it was not transferred and vested in the latter body subject to a condition that the income thereof should be credited to the Common Council of the City of London in computing the amount of their contributions to the county fund.

Per Scrutton L.J.: " Parish property " within the meaning of s. 115 means what is really property of the parish, such as village greens, vested in the Guardians, and not property held by the Guardians for poor law purposes.

Decision of Talbot J. affirmed.

SPECIAL CASE tried by Talbot J. The special case was stated in an action brought by the City of London Corporation against the London County Council, claiming a declaration that a fund consisting of 5 per cent. War Stock,

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representing the balance of the proceeds of the sale in 1921 of Homerton Institution or Infirmary, was "parish property" within the meaning of the Local Government Act, 1929 (1), and was therefore vested in the plaintiffs.

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(1) Local Government Act, 1929, s. 113, sub-s. 1: "Subject to the provisions of this Part of this Act with respect to property and liabilities for which special provision is made, any property and liabilities held or incurred by or on behalf of a poor law authority whose area is wholly comprised within one county or county borough shall on the appointed day by virtue of this section be transferred to, and vest in, the council of the county or county borough."

Sect. 115, sub-s. 1: "Any parish property vested at the appointed day in a Board of Guardians, including the proceeds of sale of parish property and any securities in which those proceeds have been invested, shall, on the appointed day, by virtue of this section be transferred to and vest in such council or body as is hereinafter mentioned; that is to say:—

"(*a*) If the parish is a parish comprised in a county borough or urban district, the council of the county borough or urban district;

"(*b*) If the parish is a rural parish having a parish council, the parish council;

"(*c*) If the parish is a rural parish not having a parish council, the representative body constituted for the holding of property of the parish. . . ."

Sect. 115, sub-s. 6: "For the purposes of this section and the Seventh Schedule to this Act, 'parish property' means any property the rents and profits of which are applicable or, if the property were let, would be applicable to the general benefit of one or more parishes, or the ratepayers, parishioners or inhabitants thereof, but does not include:—

"(*a*) Property given or bequeathed by way of charitable donation or allotted in right of some charitable donation or otherwise for the poor persons of any parish or parishes if the income of the property is not applicable to the general benefit of the ratepayers or other persons as aforesaid;

"(*b*) Property acquired by a board of guardians for the purposes of their functions in the relief of the poor."

Schedule IX., s. 1: "Where any property is transferred by or in pursuance of Part VII. of this Act [which includes ss. 113 and 115] from one authority to another authority or body:—

"(*a*) The property shall, except as otherwise expressly provided, be held by the authority or body to whom it is transferred, subject to all debts and liabilities affecting the property;

"(*b*) The latter authority or body shall hold the property for the estate, interest, and purposes, and subject to the covenants, conditions, and restrictions for and subject to which the property would have been held if this Act had not been passed, so far as they are not modified by or in pursuance of Part VII. of this Act. . . ."

By orders of the Poor Law Commissioners dated January 27 and March 10, 1837, the City of London Union was constituted, and by an order of these Commissioners, dated November 15, 1837, the East London Union was constituted.

By an order of the Poor Law Board (the successors of these Commissioners), dated September 10, 1869, the East London Union was dissolved, and by another order of that Board of the same date the parishes formerly comprised in the East London Union were added to the City of London Union.

The Homerton Institution and Infirmary was originally a poor law institution administered by the East London Union.

By an order of the Poor Law Board, dated March 18, 1871, the City of London Union was authorized to purchase the Homerton Institution, which was done accordingly.

By three orders of the Local Government Board (the successors of the Poor Law Board) made in March and May, 1873, the proceeds of sale of the Homerton Institution were applied: (i.) to pay off certain loans owing by the East London Union; (ii.) to pay the proportion of the cost of the property of the City of London Union due from the East London Union; and (iii.) as to the balance to be invested and the interest thereof applied by the City of London Union towards so much of the poor rate as was due from the parishes which formerly constituted the East London Union in proportion to their interests in the property sold. By a further order of the Local Government Board, dated May 15, 1889, the capital sum invested as aforesaid was allocated to the parishes according to their interest in the property sold, that interest being based upon their rateable value.

The purchase money of the Homerton Institution (34,010*l.*) was borrowed by the City of London Union on loan repayable by instalments, that loan being charged on the common fund of the Union. For the purpose of estimating the half-yearly contributions of the parishes to the common fund

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each parish was debited with its proportion of the loan on the basis of its rateable value.

By a local Act entitled The City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), the 112 parishes comprised in the City of London Union were united into one parish.

Subsequently to the purchase and to the passing of the last mentioned Act, the City of London Union expended large sums in extending and improving the said Institution, these sums being also provided by loans charged on the common fund in manner aforesaid.

By an order dated April 6, 1921, the Minister of Health (the successor of the Local Government Board) sanctioned the sale by the City of London Union of the Homerton Institution for 198,000*l.*, and directed that the net amount of the purchase money should be applied for such purposes and in such manner as the Minister might thereafter direct.

By a further order dated April 8, 1921, the Minister directed that the net amount of the purchase money should be invested in War Loan 5 per cent. (Inscribed) Stock, 1929-47, and that the Guardians should stand possessed of the securities so purchased upon trust to receive and pay into the common fund of the Union the interest from time to time accruing thereon.

Parts of the War Loan mentioned in the last paragraph had from time to time been realized for poor law purposes under the Orders of the Minister, but the sum of 177,316*l.* 11*s.* 5*d.* War Loan 5 per cent. (Inscribed) Stock, 1929-47, remained standing in the name of the Guardians of the Union under the order of April 8, 1921, representing the balance of the proceeds of sale of the Institution.

On February 15, 1930, the London Corporation brought the present action for the purpose of having it determined whether under the Local Government Act, 1929, the said sum of War Loan stock, which stood in the name of the Guardians of the City of London Union, should be transferred to and vest in the plaintiffs or the defendants, the London County Council.

The following questions were stated for the opinion of the Court:—

1. Whether the above mentioned fund of 177,316*l.* 11*s.* 5*d.* War Stock is parish property within the meaning of s. 115 of the Local Government Act, 1929?

2. Whether on April 1, 1930, the said fund will by virtue of the said section be transferred to and vest in the plaintiffs, the Mayor and Commonalty and Citizens of London?

3. Whether the said fund is "property with respect to which special provision is made" within s. 113 of the Local Government Act, 1929?

4. Whether, if the said fund is transferred to and vested in the defendants, the London County Council, by virtue of the said s. 113, it will be so transferred and vested subject to a condition that the income thereof shall be credited to the plaintiffs in computing the amount of their contributions to the County Fund?

Talbot J. held that the stock in question was property held by a poor law authority—namely, the Guardians of the City of London Union, within the meaning of s. 113 of the Local Government Act, 1929, and that it had not been shown to be parish property, or the proceeds of the sale thereof, and that it was by the Act of 1929 transferred to and vested in the London County Council. He accordingly answered in the negative each of the questions in the special case.

The London Corporation appealed.

Montgomery K.C., the *Hon. Stafford Cripps K.C.*, and *S. G. Turner* for the appellants.

Wilfrid Greene K.C. and *J. H. Stamp* for the respondents.

The arguments sufficiently appear from the judgments.

Cur. adv. vult.

June 2. The following judgments were read:—

SCRUTTON L.J. This appeal from Talbot J. raises the question whether a sum of 154,708*l.* 14*s.* 2*d.* invested in War Stock as the proceeds of sale of Homerton Workhouse,

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formerly the property of the City of London Guardians, now belongs, under the provisions of the Local Government Act, 1929, to the London County Council or to the Corporation of the City of London. The judge has decided in favour of the County Council; the Corporation appeal.

The question arises in this way. The Local Government Act, 1929, had as its object the extinction of all existing poor law authorities, such as Boards of Guardians, and the transfer of their rights and duties to the Councils of the Counties or County Boroughs in which they were situate. The Boards of Guardians would be relieved of their poor law duties, and deprived of their poor law property and rights. The ratepayers of their areas might gain or lose by the change. The rate they had to pay would be levied over a larger area, but for larger work; if they lost property, such as a workhouse, which would go for the benefit of a larger area, the cost of its maintenance would also be spread over a larger area. To carry out this object, s. 1 transferred the functions of the poor law authority to the Council of the appropriate County or County Borough, and provided that on April 1, 1930, all the then existing poor law authorities should cease to exist. Provision then had to be inserted for the transfer of the property of poor law authorities to the body to which their liabilities were transferred. Sect. 113 accordingly transferred to the appropriate Council, in this case the London County Council, all property and liabilities of the City of London Guardians, except those for which special provision was made in the Act. The only "special provision" which was suggested to apply was that contained in s. 115 as to "parish property" as defined in that section. By sub-s. 1 all "parish property" on April 1, 1930, vested in a Board of Guardians, was to be transferred to the appropriate Council, in this case the Common Council of the City of London. "Parish property" was defined in sub-s. 6. Sub-s. 1 runs: "Any parish property vested at the appointed day in a Board of Guardians, including the proceeds of sale of parish property and any securities in which those proceeds have been invested, shall, on the appointed day, by virtue of this section be transferred to and vest in such Council or body as is hereinafter mentioned." Then sub-s. 6 reads in this way: "For the purposes of this section and the Seventh Schedule to this Act, 'parish property' means any property the rents and profits of which are applicable or, if the property were let, would be applicable to the general benefit of one or more parishes, or the ratepayers, parishioners or inhabitants thereof, but does not include"—(*a*) is a paragraph which is immaterial—"(*b*) property acquired by a Board of Guardians for the purposes of their functions in the relief of the poor." The property mentioned in para. (*b*) is not "parish property"; the Homerton workhouse, while still the property of the Guardians, would not be "parish property." It was acquired for the relief of the poor. The liability for the relief of the poor and the property used in satisfying that liability went together to the new poor law authority, the County Council. Sect. 115, sub-s. 1, transferred to the Common Council "parish property," including the proceeds of sale of parish property and any securities in which those proceeds have been invested. But there is no provision transferring to them the proceeds of sale of property which was not "parish property." It would be curious if while the transfer of "parish property" included the proceeds of its sale, the transfer of that which was not "parish property" left the proceeds of its sale to the parish. The workhouse was not "parish property." How can it be said that its proceeds of sale were transferred to the Common Council? Another way of arriving at the same result is this: the workhouse was acquired for the purpose of the Guardians' functions in the relief of the poor, and is therefore not parish property; the fact that it is sold, and its proceeds remain in the hands of the Guardians, does not in my view prevent the workhouse and its proceeds being still "acquired for the relief of the poor"; the proceeds represent the workhouse.

The argument presented was of this nature. When Guardians were superimposed on parishes, or substituted for overseers in the relief of the poor, and several parishes were combined into one poor law union, legislation became necessary for dealing with the acquisition and sale of property by Guardians. The Act of 1835 (5 & 6 Will. 4, c. 69), by ss. 7 and 8, made Guardians a corporation, who could hold land for the benefit of an union or parish, and property might be vested in the Guardians, which had nothing to do with relief of the poor, such as village greens. Similarly parishes might have workhouses before there were unions or Guardians, or Guardians might acquire, out of the funds of the union, workhouses. Sect. 3 of the same Act empowered overseers in the case of parish property, or Guardians in the case of union property, to sell, exchange or let workhouses, and use the proceeds for workhouse purposes, "or in such other manner for the permanent advantage of such parish or union or dissolved union as the Poor Law Commissioners may approve." Sect. 28 of the Act of 1834 (4 & 5 Will. 4, c. 76) provided that a union composed of parishes should have a common fund, contributed to by the parishes composing the union in proportion to the rateable value of the parishes, for purchasing or building workhouses for such union and for maintaining workhouses, and for any other expense to be incurred for the common use and benefit or on the common account of such parishes. Homerton workhouse was purchased by the City of London Union (as first composed of 112 parishes, which were in 1907 merged into one large parish) out of the common fund of the union. I think it is clear that the workhouse was then the property of the union, and not of the parishes of which the union was composed. When in 1921 the City of London Union sold the workhouse and received the proceeds, those funds were in the same way the property of the union and not of the parish. But under the Act of 1835 the funds were to be dealt with for the permanent advantage of the union, as the Poor Law Commissioners, now the Minister of Health, might approve. If these proceeds had been derived from the sale of property of the parish the Minister must devote them to the permanent advantage of the parish. By an Order of April 8, 1921, the Minister: (1.) sanctioned the investment of the proceeds in War Loan; (2.) ordered the interest to be paid into the common fund of the union; (3.) ordered the securities not to be disposed of by the Guardians without further order. So far the parish, as distinguished from the union, appears to have no legal interest in the securities or the interest.

The argument presented by the appellants was this: the definition of "parish property" in s. 115, sub-s. 6, means any property the rents and profits of which are applicable to the general benefit of a parish or the ratepayers, parishioners or inhabitants thereof, and as the rates of the union fall on the ratepayers of the parish, any property in the common fund of the union must benefit the ratepayers of the parish, and cannot be taken away from them to benefit the ratepayers of the larger area, the county. This argument would be applicable to all poor law property such as workhouses, yet such property is clearly excluded from the definition of parish property. It further assumes the proceeds to be property of the parish, whereas they are property of the union not directly benefiting the parish. In my view this definition relates to what is really property of the parish, such as village greens, vested in the Guardians, and not to property held by the Guardians for poor law purposes. The language of the Seventh Schedule, applied by s. 115, sub-s. 2, to the sale of "parish property," seems to me quite inappropriate to the proceeds of a sale of property held by the Guardians of the union for poor law purposes. For these reasons I am of opinion that Talbot J. was correct in holding that the property in the capital fund, and interest thereon, was not "parish property" within s. 115 of the Act of 1929, was not transferred by that Act to the representatives of the City of London, and was not property for which special provision was made within the meaning of s. 113 of the Act of 1929. The first three questions asked in the special case should be answered in the negative.

The fourth question asked assumes that the capital fund is transferred to the County Council, and asks whether the interest on the fund must be credited by the County Council to the Common Council, as against the rates due from the

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latter to the former. This question does not appear to be dealt with in the judgment of Talbot J., and was not apparently argued in a way to bring it to his attention. It arises in this way. Sect. 132 of the Act of 1929 gives the Ninth Schedule statutory effect. That Schedule contains "transitional" and "temporary" provisions. "Transitional" is not, as one would expect, used of time, but of transit or transfer of property. Sect. 1 of the Schedule provides that where property is transferred from one authority to another by Part VII. of the Act, which includes s. 113, the transferee shall hold the property for the estate, interest and purposes, and "subject to the covenants, conditions, and restrictions for and subject to which the property would have been held if this Act had not been passed." It is argued that as before the Act the ratepayers of the parish would have got the benefit of the proceeds of sale, which could not have been utilized outside the union, that is, the parish, the County Council must still apply the interest for the benefit only of the ratepayers of the parish. There seems to be a conclusive answer to this. The "purposes" and "restrictions," if any, on which the property was held before the Act have been modified by Part VII. of the Act, which transfers the property to the County Council for the benefit of the whole area, which the County Council have the duty of administering. The last words of s. 1 (*b*) of the Ninth Schedule therefore prevent the argument used from succeeding. In my opinion therefore the fourth question should be answered in the negative, and the County Council do not hold the property subject to the condition suggested. The question of the terms, if any, on which the County Council hold the capital fund was not argued; no question is asked about it, and I express no opinion on it. The appeal must be dismissed with costs.

Greer L.J. In this case the Mayor and Common Council of the City ask this Court to reverse the judgment of Talbot J., who decided against their claim for a declaration that a sum of 154,708*l.* 14*s.* 2*d.* 5 per cent. War Stock was

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transferred to them by s. 115 of the Local Government Act, 1929, as "parish property." The decision was given on the argument on certain questions raised on a special case stated in an action between the appellants and the London County Council.

Broadly speaking, two questions arise in this appeal on the special case: (1.) Whether the said War Stock was "parish property" transferred to the appellants by s. 115; (2.) whether the said fund, if vested in the London County Council, was so vested subject to a condition that the income thereof should be credited to the appellants in computing their contributions to the County Fund.

When the case was stated the 1929 Act had not yet come into operation, and the questions in the case are stated in the form applicable to a future transfer. But when the appeal came on the Act had come into operation, and I have, accordingly, stated the questions in the form in which they had necessarily to be argued when the case reached the Court of Appeal.

A considerable number of orders of the Poor Law Commissioners and one Private Act of Parliament were made part of the special case, but these were only required to trace the history of the fund in question, and it is unnecessary to refer to them in detail. They show that, before the year 1921, the City of London Union had become the owners of a workhouse known as the Homerton Institution and Infirmary, which they had bought from the Guardians of a smaller union which had been incorporated in the City of London Union, and they had paid the purchase money in the manner prescribed by the Poor Law Commissioners and their successor, the Minister of Health, under the powers conferred upon them by law. In 1907 the 112 parishes of the City of London Union were by an Act of that year amalgamated and made into one parish.

On April 6, 1921, with the approval of the Minister of Health, the City of London Union (which then consisted of the one parish into which its 1122 parishes had been converted by the City of London (Union of Parishes) Act, 1907)

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sold the Homerton Institution for the sum of 198,000*l.* On the same date the Minister of Health directed the nett amount of the purchase money to be invested in 5 per cent. War Stock, and ordered the Guardians of the union to hold the Stock so purchased upon trust to receive and pay into the common fund of the union the interest from time to time accruing thereon. The Minister further directed that the securities so purchased should not be sold or otherwise disposed of without his further direction.

The common fund was a fund into which the contributions of the parish ratepayers had to be paid by reason of the provision of s. 28 of 4 & 5 Will. 4, c. 76, which also enacted that the fund should be used for the purposes of providing and maintaining workhouses and for other expenses incurred for the common use and benefit of the parishes.

The Local Government Act, 1929, came into force on April 1, 1930, by which time the War Stock had become reduced to a nett amount of 154,708*l.* 14*s.* 2*d.* The decision of the questions involved in this appeal turns on the true interpretation and right application of ss. 1, 113 and 115 of the Local Government Act, 1929, and of s. 1 of the Ninth Schedule to that Act.

By s. 1, as applied to London, the functions of the City Board of Guardians were transferred to the County Council, and that Board ceased to exist.

Sect. 113 is the first section in Part VII. of the Act which deals with property, liability and officers. By that section, subject to the provisions of Part VII. with respect to property and liabilities for which special provision is made, any property and liabilities held or incurred by or on behalf of the City Union were transferred to and vested in the London County Council.

By s. 115, which is included in Part VII., any parish property vested in the City Guardians, including the proceeds of the sale of parish property and any securities in which those proceeds had been invested, were transferred to the Corporation of the City of London. Sect. 115, sub-s. 6, contains a definition of the term "parish property" as used in the section. This sub-section is in the words following: "For the purposes of this section and the Seventh Schedule to this Act, 'parish property' means any property the rents and profits of which are applicable or, if the property were let, would be applicable to the general benefit of one or more parishes, or the ratepayers, parishioners or inhabitants thereof, but does not include: (*a*) property given or bequeathed by way of charitable donation or allotted in right of some charitable donation or otherwise for the poor persons of any parish or parishes if the income of the property is not applicable to the general benefit of the ratepayers or other persons as aforesaid; (*b*) property acquired by a Board of Guardians for the purposes of their functions in the relief of the poor."

The appellants, by their counsel, contended that the War Stock in question was property applicable to the general benefit of the ratepayers, parishioners or inhabitants of the City, and that it was not property acquired by the Guardians for the purposes of their functions in relief of the poor.

It was contended for the respondents that the property was not parish property within the first part of sub-s. 6, inasmuch as it was not applicable for the general benefit of the ratepayers, parishioners or inhabitants of the parish, but was applicable only for the benefit of the poor of the parish; but if it was, prima facie, parish property within the words of this part of the sub-section, para. (*b*) of the sub-section shows that the sub-section as a whole must be read as not including the property in question, inasmuch as it was property acquired for the purposes of poor law relief.

In my judgment, the respondents' argument is entitled to succeed. I think the property in question was parish property applicable to the general benefit of the ratepayers of the City of London Parish, inasmuch as it enured for the benefit of all the ratepayers by being applicable pro tanto to the performance of their duty to relieve the poor of the parish. But I think it was property which was acquired for the purposes of their functions in the relief of the poor, and by reason of para. (*b*) of sub-s. 6 it was taken out of the definition of "parish property" contained in the first part of the section. There can be no doubt that the workhouse was so acquired, and it seems to me to follow that when they sold the workhouse and acquired in its place money which they invested in War Stock, the interest on which they were obliged to pay into their common fund, both the money and the stock can be accurately described as property acquired for the purposes of their functions in the relief of the poor. It would be strange if the effect of the Act had been to transfer to the County Council institutions which had not been sold, but to transfer to the City Council stock in which the proceeds of sale of a poor law institution had been invested, the interest of which had been lawfully ordered to be paid into the common fund and could only be used for poor law purposes. The whole object of the Act was to transfer poor law functions, liabilities and property to the County Council. It would not be reasonable to construe the provisions of the statute as transferring duties and liabilities to the newly created poor law authority but transferring to another body property which Guardians held for the purpose of enabling them to perform their poor law duties. There are no words in s. 115 of the Act sufficient to compel the Court to construe the section in a manner which would produce such unreasonable consequences. In my judgment the learned judge's decision on this part of the case was right.

It remains for me to consider whether the Court ought to give effect to the alternative contention of the appellants that the stock, though transferred to the County Council must, by reason of the provisions of s. 1 of the Ninth Schedule, be held by the County Council for the benefit of the ratepayers of the City and the income of the stock credited to the ratepayers of the City as against their contributions to the poor rate. The section in the Schedule is in these words: "Where any property is transferred by or in pursuance of Part VII. of this Act from one authority to another authority or body—(*a*) the property shall, except as otherwise expressly provided, be held by the authority or body to whom it is transferred subject to all debts and liabilities affecting the property; (*b*) the latter authority or body shall hold the property for the estate, interest, and purposes, and subject to the covenants, conditions, and restrictions for and subject to which the property would have been held if this Act had not been passed, so far as they are not modified by or in pursuance of Part VII. of this Act." Then follows sub-s. (*c*), which I need not read.

The question thus raised is one of considerable difficulty, and I was at one time inclined to the view that the appellants' argument on this part of the case ought to prevail by reason of the express words of the section. The stock in the hands of the Guardians was subject to the conditions and restrictions enacted by s. 3 of the Union and Parish Property Act, 1835 (5 & 6 Will. 4, c. 69). That section gave power to the Guardians to sell property and to apply the proceeds of sale to the expense of erecting or purchasing a workhouse or as a loan to the Guardians for the purpose of erecting a workhouse or in liquidation of any debt contracted by the parish or union or dissolved union for the permanent advantage of the parish or union or dissolved union (to whom the property sold had belonged) as the Poor Law Commissioners might approve. This section, which is still in operation, with the substitution of the Minister of Health for the Poor Law Commissioners, has the effect that before the transfer to the County Council, the Board of Guardians held the War Stock for purposes restricted to the permanent advantage of their union and subject to the conditions and restrictions mentioned in s. 3 of the Act of 1835. At first sight, s. 1 of the Ninth Schedule of the Act of 1929 appears to produce the result that the County Council holds the stock for the purposes and subject to the conditions and restrictions set out in the Act of 1835, if the words are to be literally interpreted. But such an interpretation of the section would almost stultify the object that the Act of 1929 was intended to effect. It would mean that the properties of each union, including the workhouses and all their appliances, though transferred to the County Council, should be kept in separate compartments and used by the County Council for the benefit of the inhabitants of the unions severally. In my judgment, the Act was intended not only to create larger areas for poor law administration, but also to pool the resources of all the unions so that they could be used for the benefit of the whole of the enlarged area. I think it is possible to interpret s. 1 of the Ninth Schedule in a way which is consistent with the object for which the statute was passed. I think the word "purposes" is satisfied by holding that it means "general purposes" and that the section, so far as it refers to purposes, will not be contravened if the County Council applies the interest of the stock to poor law purposes. I think the words "covenants, conditions and restrictions" are used in the narrow sense of covenants, conditions and restrictions contained in some deed or agreement under which some particular property might be held by a Board of Guardians for purposes other than poor law purposes, and do not include statutory provisions such as those contained in s. 3 of the Act of 1835, directing how poor law property is to be applied.

For these reasons, I agree, though not without some doubt, that the second contention of the appellants also fails. In my judgment the appeal should be dismissed with costs.

Slesser L.J. In this appeal four questions concerning a fund the proceeds of the sale of a workhouse known as the Homerton Institution are stated by special case for the opinion of the Court. The first, which is as follows—namely, "whether the fund in dispute is parish property within the meaning of s. 115 of the Local Government Act, 1929?" has been answered by Talbot J. in the negative. By his answer the learned judge has, in effect, decided that the fund, the property in which is in dispute between the London County Council and the Common Council of the City of London, under s. 113 of the 1929 Act is transferred to and vested in the London County Council. From this answer and judgment the Common Council of the City of London appeal.

The history of the fund, so far as is material to this case, before the Local Government Act, 1929, is as follows: On April 6, 1921, the Minister of Health authorized the sale by the Guardians of the City of London Union of their workhouse, the Homerton Institution, and by order of April 8, 1921, directed as follows: "That the said Guardians shall upon its receipt by them invest the net amount of the purchase money arising from the said sale in the purchase of War Loan Five per centum (Inscribed) Stock 1929–47, and shall stand possessed of the securities so purchased upon trust to receive and pay into the common fund of the union the interest from time to time accruing thereon; And further directs that the securities so purchased shall not without his further direction be sold or otherwise disposed of by the said Guardians." This direction was made under a power conferred upon the Poor Law Commissioners, the predecessors of the Minister of Health, by s. 3 of the Union and Parish Property Act, 1835. That Act is described as an Act to facilitate the conveyance of workhouses and other property of parishes and of incorporations or unions of parishes. It gave power to the Guardians of parishes or unions and overseers of any parish not under a Board of Guardians to sell or otherwise dispose of any workhouse or property belonging to such parish or union, and to apply the proceeds of any such sale towards the purchase or building of workhouses or in such other manner for the permanent advantage of such parish or union as the Poor Law Commissioners might approve. The fund here in question is the produce of the sale by the Guardians of the City of London Union of union property, and the Act of 1835 applies to it.

By the City of London (Union of Parishes) Act, 1907, the parishes of the City of London were, for all purposes other than ecclesiastical or charitable, united in one parish, and it is this parish which is said by the appellants to be the owners of the fund as parish property, through whom the Common Council of the City of London derive their title. The Homerton Institution was originally a poor law institution owned and administered by the East London

Union; that union was subsequently dissolved and absorbed in the City of London Union. Thereafter, as a result of various orders duly made, the Homerton Institution became the property of the City of London Union.

Sect. 113 of the 1929 Act vests the property of a poor law authority whose area is wholly comprised within the County of London in the London County Council, subject to certain special provisions, and such special provisions are contained in s. 115 of the same Act. It is argued on behalf of the City of London, that s. 115 applies to this fund, in which case the property in the fund would vest in the Council of the City of London by virtue of sub-s. 7 of that section.

It is not seriously contended that the Homerton Institution, as such, was ever parish property, but it is said that the fund, the proceeds of the sale thereof, is parish property. The appellants say that the directions of the Minister that the interest of the fund shall be paid into the common fund of the union is for the general benefit or permanent advantage of the parish of the City of London, and is, therefore, parish property in that it is property the rents and profits of which are applicable to the general fund of the parish within the meaning of s. 115, sub-s. 6, of the 1929 Act.

It is to be noted that the Poor Relief Act, 1819, provided that the churchwardens and overseers of a parish should hold property under that Act, including workhouses, for the general benefit of the inhabitants or ratepayers of the parish, but at that time the Guardians did not exist, and the Act of 1835, which gives power to the Guardians to sell both union and parish property, the latter being still vested as to ownership in the parochial officials, speaks of the application of the proceeds of such sale for the permanent advantage of the parish or union.

It is clear when the history of the matter is considered that these words must be read disjunctively; both in the case of union property and in the case of parish property, the Guardians (until 1894 in the case of rural parishes) were the selling authority, and the clear intention of the Act of

1835 was that, such property being sold by the Guardians, in either case the proceeds of the sale of union property were to be applied for the permanent advantage of the union (as the direction of the Minister here recognizes) and the sale of parish property to be applied for the permanent advantage of the parish.

I conclude therefore that the proceeds of this sale of union property were held for the general benefit or permanent advantage or common fund of the union and not the parish, and that the rents and profits are not applicable to the general fund of the City of London Parish and that consequently the fund is not parish property.

As in my view the Homerton Institution was never parish property, the question of the position of the sale of the proceeds of parish property which is to be deemed to be parish property under s. 115, sub-s. 1, of the 1929 Act does not arise, so that it is not necessary, save for purposes of general construction, to consider para. (*b*) of sub-s. 6 of s. 115, whereby parish property is said not to include property acquired by a Board of Guardians for the purpose of their functions in the relief of the poor. It was said by Mr. Greene for the respondents that these words were probably intended to be descriptive and not definitive by exclusion, but an explanation of these words may be found in the fact that the Legisture may have had regard to certain parish property which had come in some measure to be acquired by the Guardians for poor law purposes, such as workhouses, built by the parish under the Poor Relief Act, 1601, which had come to be occupied by the Guardians under the authority of ss. 23 and 26 of the Poor Law Amendment Act, 1834. These old parish workhouses, though acquired by the Guardians, might yet be parish property, for the legal estate therein remained with the churchwardens: *Doe* dem. *Norton* v. *Webster*. (1) Again, the parish may have owned or built cottages for the poor under the authority of the Poor Relief Act, 1601, or houses for the poor purchased under the Poor Relief Act, 1722, or, thirdly, the sub-section may apply to parish

(1) (1840) 12 A. & E. 442.

workhouses which, after 1834, were acquired by a union created subsequently to 1834. In all these cases the property would remain parish property, though after 1834 they may have come to be acquired by the Guardians. I think it was intended that such parish property (unlike parochial offices, allotments or other land for the benefit of the parochial inhabitants at large) were to pass to the County or County Borough Council for use in the exercise of their poor law functions, and that the language of para. (*b*) of sub-s. 6 is intended to produce this result.

Questions two and three—namely: "Whether on April 1, 1930, the said fund will by virtue of the said section be transferred to and vest in the plaintiffs the Mayor and Commonalty and Citizens of the City of London, and, whether the fund is 'property with respect to which special provision is made' within s. 113 of the Local Government Act, 1929 ?" fall to be decided in the negative for the reasons already stated.

Question four: "Whether if the said fund is transferred to and vested in the defendants the London County Council by virtue of the said s. 113, it will be so transferred and vested subject to a condition that the income thereof shall be credited to the plaintiffs in computing the amount of their contributions to the County Fund ?" raises a different and difficult point. It is provided by s. 132, sub-s. 1, of the 1929 Act that "the provisions set out in the Ninth Schedule to the Act which relates to transitional and temporary matters shall have effect for the purposes of this Act," and the Ninth Schedule, para. 1 (*b*), provides that where any property is transferred by or in pursuance of Part VII. of the Act (which is here the relevant part) from one authority to another that: "the latter authority or body shall hold the property for the estate, interest, and purposes, and subject to the covenants, conditions, and restrictions for and subject to which the property would have been held if this Act had not been passed, so far as they are not modified by or in pursuance of Part VII. of this Act," and it is argued for the appellants that, in so far as the property if the Act had not been passed was by order of the Minister held by the

Guardians upon trust to receive and pay into the common fund of the union interest from time to time accruing thereon that such an estate, interest or purpose or covenant, condition, or restriction still applies to the fund though it be vested in the London County Council and that it is still so subject.

Question four does not raise any point upon the capital which was declared not to be sold or otherwise disposed of by the Guardians without the further direction of the Minister of Health, but is limited to the condition in the order as regards the interest.

If the contention of the appellants be correct, all the properties transferred under Part VII. which have any particular estate, interest or purpose or are subject to any covenant, condition, or restriction, remain so affected. Such a contention appears to me to violate the basic principles of the Act. Thus, to take one word alone, the word "purpose." It is provided by s. 1 that the functions of the poor law authority shall be transferred to the county or county borough, and thereby a change of purpose is effected in that the purposes of the Guardians were limited to their area whereas s. 1 absorbs their area into a wider one. Moreover, if the argument be right, the property of each defunct poor law authority would be limited as to its estate and interest to its own area and many other anomalies would arise, a result which seems to be very inconsistent with the description of s. 132 that the Ninth Schedule relates to transitional and temporary matters. In my opinion, the restricted meaning of s. 1 (*b*) of the Ninth Schedule is shown by the language used: "estate, interest, and purposes" and "covenants, conditions, and restrictions." These words point, I think, to matters appropriate to particular property, as such, and the words "purposes" and "restrictions" must be read ejusdem generis with estate and covenants and be limited to particular charges trusts or obligations applicable to individual property, as such, and not to property generally affected by the whole of Part VII. of the Act. For example, it may well operate to protect the purposes of charities and

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benefactions vested in the Guardians. The concluding words "so far as they are not modified by or in pursuance of Part VII. of this Act," are intended, I think, although the phrasing is not happy, to have this effect. I do not think, though it is not necessary to decide it, that they even go so far as to have the meaning which Mr. Greene suggested of appropriating the property to the various respective functions of the Guardians described in the Act, such as poor law, registration or vaccination, and it would appear that this Schedule is powerless, apart from special restrictions upon particular property, to prevent the Council from performing generally any of the functions or using any of the property transferred to them from the Guardians for any purpose to which the Guardians could properly put such property, but it is not necessary to decide this point, for in any event, it is clear to my mind that it cannot have the extended meaning contended for by Mr. Montgomery.

I agree, therefore, with the answer of Talbot J. in the negative wherein he decided that the property was not subject to the conditions set out in the question.

For these reasons, I am of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *City Solicitor.*
Solicitor for respondents: *S. A. R. Preston-Hillary.*

J. S. H.

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REVENUE OFFICER, CARDIFF (BOROUGH) ASSESSMENT AREA *v.* CARDIFF (BOROUGH) ASSESSMENT COMMITTEE AND WESTERN MAIL, LIMITED.

SAME *v.* SAME, AND DAVID DUNCAN AND SONS, LIMITED.

Rates—Valuation Lists—Derating—Industrial Hereditaments—Apportionment—Newspaper Offices and Printing Works—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149, *sub-ss.* 1, 4—*Rating and Valuation (Apportionment) Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-s.* 1; *s.* 4, *sub-s.* 2.

Printing offices and works in which a newspaper was composed, printed, and published, were included in the Special List under the Rating and Valuation (Apportionment) Act, 1928, as an industrial hereditament, and an apportionment was made of the net annual value of the hereditament according as its various parts were used for industrial or non-industrial purposes:—

Held, that the hereditament was properly included in the Special List as an industrial hereditament, as the composing, printing, and publishing of a newspaper was the making of an article and the adapting for sale of an article within the meaning of s. 149 of the Factory and Workshop Act, 1901, and therefore the hereditament came within the definition of a non-textile factory, the primary purpose for which the hereditament was occupied and used being an industrial purpose.

Held, further, that the annual value of the hereditament must be apportioned according to the occupation and use thereof for industrial purposes, and the occupation and use for other purposes; that those portions of the premises which were occupied and used for printing, composing, engraving, publishing and circulating were used for industrial purposes and entitled to be derated, but that those portions of the premises which were occupied and used for the editorial department, general administrative offices and clerical staff, advertising department, stationery counter, and returns store were used for non-industrial purposes and not entitled to be derated.

REVENUE OFFICER, CARDIFF BOROUGH ASSESSMENT AREA *v.* CARDIFF BOROUGH ASSESSMENT COMMITTEE AND WESTERN MAIL, LIMITED.

Special Case stated under and in pursuance of s. 31, sub-s. 5, of the Rating and Valuation Act, 1925.

The Western Mail, Ld., were the occupiers of a hereditament described in the Valuation List for the parish of Cardiff as "shop, offices, printing works and appurtenances, 69 St. Mary Street."

The said hereditament was included in the Special List as an industrial hereditament at a net annual value of 1700*l.* which was apportioned therein by the Cardiff Area Assessment Committee as follows :—

Net annual value for industrial purposes	990*l.*
Net annual value for non-industrial purposes	710*l.*
Rateable value	957*l.*

Against the decision to so include the hereditament in the Special List the Revenue Officer lodged an appeal to which the Assessment Committee and the Western Mail, Ld. (the occupiers), were respondents; and against the decision to apportion the assessment of the hereditament in the manner described above the Western Mail, Ld., lodged an appeal to which the Assessment Committee and the Revenue Officer were respondents.

At the Court of Quarter Sessions held in and for the City of Cardiff on October 16, 1929, the appeal of the Revenue Officer against the decision to include the hereditament in the Special List and the appeal of the Western Mail, Ld., against the apportionment came on for hearing before the Recorder, when the following facts were admitted or proved :—

(*a*) The hereditament consisted of one self-contained building which had a small frontage to St. Mary Street and about 132 feet to Great Western Lane. It had a basement and four floors over. These, except such parts as were separately sub-let, were included in one assessment. The Western Mail, Ld., occupied and used the whole of the premises for the purposes of printing and publishing the following newspapers—namely: The "Western Mail," a morning daily paper; the "Evening Express," a daily evening paper; and the "Cardiff Times" and the "Weekly Mail," two weekly papers.

(*b*) There was on the ground floor a stationery counter and, excepting what was sold thereat, nothing but the aforesaid newspapers was sold or distributed from any part of the premises.

(*c*) The hereditament was registered under the Factory and Workshop Acts, and the factory inspector in his visits was not restricted by the occupiers to any part of the hereditament.

(*d*) The *Basement* had a floor area of 8759 sq. feet, of which a space of 7148 sq. feet was occupied and used for printing and stereo-casting, whilst a space of 1611 sq. feet was used as a " Returns " store.

In this part of the building very heavy machinery was installed, and for the prevention of excessive vibration and the steadying of the machines themselves the floor had had to be specially strengthened.

Amongst the machinery so installed were rotary printing presses, stereo-casting, and steam boilers.

The *Ground Floors* had a total area of 8612 sq. feet divided as follows :—

For the purpose of publishing and circulating .	2000 sq. feet
For advertising purposes	3157 do.
Stationery counter	674 do.
Contents bills composing room	664 do.
Accounts department	2117 do.

The *First Floors* had a total area of 7338 sq. feet, divided as follows :—

Used by reporters, sub-editors and others .	3152 sq. feet
Used as creed room	247 do.
Used for process engraving	2267 do.
Board room, manager's office, etc. . . .	1672 do.

The *Second Floor* had a total area of 6104 sq. feet, divided and used as follows :—

For linotype machines	5308 sq. feet
Readers' rooms	526 do.
Canteen	270 do.

That to carry the weight of these linotype machines it had been necessary to specially strengthen the floor.

The *Third Floor* had an area of 3861 sq. feet and was used as a paper reel stores.

The *Fourth Floor* consisted of caretaker's rooms with a total floor space of 439 sq. feet.

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The total floor space of the whole building was 35,113 sq. feet, and this was given in percentages as follows:—

Printing, engraving, etc.	57·8%
Publishing, circulating, etc.	19·2%
Editorial	9·0%
Management, accounts, etc.	10·8%
Stationery counter and caretaker's rooms	3·2%
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A summary of the particulars in (*d*) above in the form of a printed schedule was proved, and the schedule was attached to and formed part of the case, marked " A."

(*e*) The bulk of the news came by post, over the telegraph wires, telephones, tapes and various other mechanical contrivances from the great agencies such as Reuter's and the Press Association and poured into the creed room from these outside agencies.

In the same way the news from the area of South Wales was received; but the news from the City of Cardiff was collected by reporters, who brought it to the Editorial department of the hereditament. The most of this was transcribed before it reached the office.

Most reviews were written outside by experts, but the leading articles were written on the premises.

Local advertisements, as well as those from other parts of the country, were received from agencies, by post and by telegram, and some at the advertisement counters on the ground floor.

All " copy " when ready for printing was sent to the linotype department, which had a battery of over thirty linotype machines to carry which the floor had had to be specially strengthened. By these it was set up and cast in lines. Pages were then made up in forms on metal, and an impression of these forms taken under great pressure in a large mangle. At this stage the photographic blocks produced in the process-engraving room were inserted in these forms.

The matrices or cardboard impressions were sent to the stereo-casting department, where the stereo was cast and put on the rotary printing presses. The newspaper was then printed, folded and cut by machinery. It was afterwards transferred from the basement printing works to publishing department and ground floor by means of mechanical conveyors, and from there loaded into vans and lorries for the railway stations and to other customers.

(*f*) The newspapers were supplied to wholesalers who supplied retail agents, and also to retail agents direct.

(*g*) A small percentage of the newspapers thus supplied was returned. Of these a large proportion was cut up and over-printed as "contents bills," and the remainder tied in bundles and shipped abroad.

The part of the building into which these "returns" were brought was also used to store oils, metals, blankets and other things used in the factory.

(*h*) By far the greater intrinsic value of the premises and contents was on the side of mechanical printing and engraving processes, printing machines being the great bulk. The other operations did not take up very much in the way of expense or space.

(*i*) The wages and salaries paid in the mechanical departments, including machine, composing, stereo foundry, photoblock, readers, publishing, creed, maintenance, and stores department amounted to 62·77 per cent. of the whole; and those in the non-mechanical departments, including manager's, secretary's, accountants', advertisement, editorial, cleaners', printing office and shop departments amounted to 37·23 per cent.

On the part of the appellant in the first appeal (the Revenue Officer) it was contended:—

(*a*) That the said hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, and/or (*b*) That the said hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it was primarily occupied and used for one of the following purposes, that is to say :—

(1.) The purposes of offices and/or for purposes in respect of the general direction and management of newspapers and/or for editorial or other purposes and for the purposes of the collection and dissemination of news and advertisements and for purposes not being the purposes of a factory or workshop.

(2.) The purposes of a retail shop.

(3.) The purposes of distributive wholesale business.

On the part of the respondent occupiers it was contended :—

(*a*) That the hereditament was an industrial hereditament within s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, and that the decision of the Assessment Committee to include it as such in the Special List was right.

(*b*) That the onus of showing the hereditament was primarily occupied and used for any of the purposes enumerated in the proviso to s. 3, sub-s. 1, above cited or for any combination of such purposes was upon the appellant, and that the evidence failed to discharge such onus of proof.

(*c*) That as the appellant had not pleaded in his statement of case that the hereditament was occupied and used primarily for the purpose of distributive wholesale business he was not entitled to do so at the hearing of the appeal.

On behalf of the respondents, the Assessment Committee, it was contended that the said hereditament was an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

The Recorder decided in favour of the respondent occupiers' and the respondent Assessment Committee's contentions that the hereditament was an industrial hereditament, and was not primarily occupied and used for the purposes of distributive wholesale business, nor for any of the other purposes referred to in s. 3, sub-s. 1 (*f*), of the said Act, and that the Assessment Committee's decision to include it in the Special List was correct.

On the part of the appellants (Western Mail, Ld.) in the second appeal it was contended :—

(*a*) That the said hereditament being an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, should have been regarded and treated as wholly industrial in the Special List and not subjected to any apportionment under s. 4 of that Act.

(*b*) That the evidence in regard to the nature, occupation and user of the said hereditament with the exception of the stationery counter and the caretaker's apartments supported contention (*a*), and that these two exceptions taken together formed less than 10 per cent. of the net annual value of the remainder of the hereditament within the provisions of s. 4, sub-s. 2, of the Act of 1928 last mentioned.

(*c*) That on a true construction of the Factory Acts, 1901–1920, the premises as a whole comprised a factory, and that it was contrary to law to divide the hereditaments into portions which were occupied and used for purely manufacturing and productive purposes as distinct from such portions as were ancillary to such occupation and user of those parts ; but that for the purposes of the Rating and Valuation (Apportionment) Act, 1928, the premises must be regarded as one entire whole.

On the part of the respondent Revenue Officer it was contended :—

(*a*) That the said hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, and/or

(*b*) That the said hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Act of 1928, in that it was primarily occupied and used for one of the following purposes or for the combination of such purposes, that is to say :—

1. The purposes of offices and/or for purposes of the general direction and management of newspapers and/or for editorial or other purposes and for the purposes of the collection and dissemination of news and advertisements, such purposes not being the purposes of a factory or workshop.

2. The purposes of a retail shop.

3. The purposes of distributive wholesale business.

(*c*) If (contrary to the respondent's contention that the decision of the Assessment Committee that the said hereditament was an industrial hereditament was wrong) the said hereditament should be held to be an industrial hereditament within the meaning of the aforesaid Act, the respondent contended that the said apportionment was correct and fair and in accordance with the provisions of the said Act.

On behalf of the respondents, the Assessment Committee, it was contended that the decision of the Assessment Committee as to apportionment was correct and fair and in accordance with the provisions of the said Act.

The Recorder decided in favour of the appellant occupiers' contentions, and gave judgment in favour of the appellants with costs against the respondent, the Revenue Officer.

Having held in the first appeal that the hereditament was an industrial hereditament the Recorder further decided that the said hereditament was wholly industrial and that by reason of the fact that the only portions of the premises occupied and used for purposes other than industrial purposes within the meaning of the said Act were the stationery counter and caretaker's premises and that these portions occupied less than 10 per cent. of the remainder of the hereditament, the assessment of the said hereditament ought not to be apportioned and did not come within s. 4 of the said Act for that purpose.

The questions upon which the opinion of the Court was desired were :—

1. Whether on a true construction of sub-s. 1 of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, and on the facts proved and admitted at the hearing of the first and second appeals, the Recorder was entitled to hold as he did—namely :—

On the first appeal: That the hereditament referred to was an industrial hereditament and had been properly included as such in the Special List; and

On the second appeal: That in such List the said hereditament should be regarded and treated as wholly industrial and that no apportionment under s. 4 of the aforesaid Act should be made.

AREA OF EACH FLOOR AND DESCRIPTION OF USER.

Total Area of Floor in square feet.		Printing, Composing, Engraving, etc. sq. ft.	Publishing, Circulating. sq. ft.	Editorial. sq. ft.	Accounts, Manager, etc. sq. ft.	Non-Industrial. sq. ft.	Remarks.
8759	Basement . .	7148	—	—	—	—	Here are Rotary Printing Presses, Stereo Casting, Steam Boilers, etc.
		—	1611	—	—	—	"Returns" Stores.
8612	Ground Floors .	—	2000	—	—	—	Publishing, Circulating.
		—	3157	—	—	—	Advertising.
		—	—	—	—	674	Stationery Counter.
	Ditto (Intermediate floor)	664	—	—	—	—	Contents Bills Composing and Printing Room.
	Ditto ditto .	—	—	—	2117	—	Accounts Department.
7338	First Floors .	—	—	3152	—	—	Reporters, Sub-editors, etc.
		247	—	—	—	—	Creed Room.
		1715	—	—	—	—	Process Engraving.
	Ditto (Intermediate floor)	552	—	—	—	—	Process Engraving.
		—	—	—	1672	—	Board Room, Manager's Office, etc.
6104	Second Floor .	5308	—	—	—	—	Linotype Machines, etc.
	Ditto (Intermediate floor)	526	—	—	—	—	Readers' Rooms.
	Ditto ditto .	270	—	—	—	—	Canteen.
3861	Third Floor .	3861	—	—	—	—	Paper Reel Stores.
439	Fourth Floor .	—	—	—	—	439	Caretaker's Rooms.
		20,291					=57·8% Printing, Engraving, etc.
			6768				=19·2% Publishing, Circulating, etc.
				3152			= 9·0% Editorial.
					3789		=10·8% Accounts, Manager, etc.
						1113	= 3·2% Non-Industrial.
5,113	Total square feet of Floor Space (as agreed).						100·0%

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CARDIFF REVENUE OFFICER v. CARDIFF ASSESSMENT COMMITTEE.

REVENUE OFFICER, CARDIFF BOROUGH ASSESSMENT AREA v. CARDIFF BOROUGH ASSESSMENT COMMITTEE AND DAVID DUNCAN AND SONS, LIMITED.

Special Case stated under and in pursuance of s. 31, sub-s. 5, of the Rating and Valuation Act, 1925.

In the Valuation List for the parish of Cardiff David Duncan & Sons, Ld., appeared as the occupiers and were assessed in respect of a hereditament therein described as follows: "Printing works and offices, 102 St. Mary Street."

The Assessment Committee for the borough of Cardiff decided to include the said hereditament in the Special List as an industrial hereditament, and apportioned the net annual value thereof (1300*l.*) in the following manner:—

Net annual value for industrial purposes	825*l.*
Net annual value for non-industrial purposes . . .	475*l.*
Rateable value	681*l.*

Against the decision to include the said hereditament in the Special List the Revenue Officer gave notice of appeal to which the Assessment Committee and David Duncan & Sons, Ld., the occupiers, appeared as respondents; and against the apportionment of the net annual value of such hereditament David Duncan & Sons, Ld. (the occupiers), gave notice of appeal to which the Revenue Officer and the Assessment Committee appeared as respondents.

At the Court of Quarter Sessions held in and for the City of Cardiff on October 16, 1929, the aforesaid appeals came on for hearing before the Recorder, when the following facts were admitted or proved:—

(*a*) The premises were occupied and used for the printing and publishing of a daily evening newspaper called the "South Wales Echo," and such premises were registered under the Factory and Workshop Acts, 1901–1920.

(*b*) The premises comprised a basement with four floors known as 102–105 St. Mary Street, and except such portions as were separately let and separately assessed the four floors were included in the same assessment. The total floor space was 32,538 sq. feet, divided as follows :—

Basement, 7647 sq. feet, occupied and used for printing, and in which were placed printing presses and stereo-casting machinery.

Ground Floor, 7322 sq. feet, of which 3963 were used for the purposes of publishing and circulating and 3359 represented the general offices, board room and accountants' department.

First Floor, 4410 sq. feet, used as composing room, readers' room and block room.

Second Floor, 4253 sq. feet, 150 of which were used as a creed room and 4103 represented the editorial department.

Third Floor, 3635 sq. feet, 1006 of which represented the advertisement composing rooms, 1152 a mess-room, etc., for the staff, and 1477 an additional part of the editorial department.

Fourth Floor, 5271 sq. feet, 2040 of which were occupied and used for process engraving, 400 as electrical, etc., stores, 1302 as a filing department and 1529 for the purposes of a "returns" stores.

The total floor space was divided in the following percentage :—

Printing, composing, engraving, etc.	51·6%
Publishing, circulating, etc.	16·9%
Editorial	17·2%
Accounts, manager, etc.	14·3%
	100

A summary of the particulars in (*b*) above in the form of a printed schedule was proved, and the schedule was attached to and formed part of this case, marked "A."

There was no stationery department and there were no caretaker's quarters.

The process or processes of printing, production and publishing of the "South Wales Echo" were the same as those proved in regard to the "Western Mail" appeal.

On the part of the appellant in the first appeal it was contended:—

(*a*) That the said hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, and/or

(*b*) That the said hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it was primarily occupied and used for one of the following purposes or for a combination of such purposes, that is to say, the purposes of offices for and for purposes ancillary to the general direction and management of a newspaper and/or for editorial and other purposes and for the purposes of the collection and dissemination of news and advertisements, such purposes not being the purposes of a factory or workshop.

(*c*) The purposes of distributive wholesale business.

On the part of the respondent occupiers in the first appeal it was contended:—

(*a*) That the hereditament was an industrial hereditament within s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, and that the decision of the Assessment Committee to include it as such in the Special List was right.

(*b*) That the onus of showing that the hereditament was primarily occupied and used for any of the purposes enumerated in the proviso to s. 3, sub-s. 1, above cited or for any combination of such purposes was upon the appellant, and that the evidence failed to discharge such onus of proof.

(*c*) That as the appellant had not pleaded in his statement of case that the hereditament was occupied and used primarily for the purpose of distributive wholesale business he was not entitled to do so at the hearing of this appeal.

On behalf of the respondents, the Assessment Committee, it was contended that the said hereditament was an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

The Recorder decided in favour of the respondent occupiers' and the respondent Assessment Committee's contentions that the hereditament was an industrial hereditament, and was not primarily occupied and used for the purposes of distributive wholesale business nor for any of the other purposes referred to in s. 3, sub-s. 1 (*f*), and that the Assessment Committee's decision to include it in the Special List was correct.

On the part of the appellants (David Duncan & Sons, Ld.) in the second appeal it was contended :—

(*a*) That the said hereditament being an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, should have been regarded and treated as wholly industrial in the Special List and not subjected to any apportionment under s. 4 of that Act.

(*b*) That the evidence in regard to the nature, occupation and user of the said hereditament supported contention (*a*).

(*c*) That on a true construction of the Factory Acts, 1901–1920, the premises as a whole comprised a factory, and that it was contrary to law to divide the hereditament into portions which were occupied and used for purely manufacturing and productive processes as distinct from such portions as were ancillary to such occupation and user of those parts; but that for the purposes of the Rating and Valuation (Apportionment) Act, 1928, the premises must be regarded as one entire whole.

On the part of the respondent Revenue Officer it was contended :—

(*a*) That the said hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, and/or

(*b*) That the said hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it was primarily occupied and used for one of the following or for the combination of such purposes, that is to say :—

1. The purposes of offices and/or for purposes of the general direction and management of newspapers and/or for editorial

or other purposes and for the purposes of the collection and dissemination of news and advertisements, such purposes not being the purposes of a factory or workshop.

2. The purposes of distributive wholesale business.

(*c*) If (contrary to the respondent's contention, that the decision of the Assessment Committee that the said hereditament was an industrial hereditament was wrong) the said hereditament should be held to be an industrial hereditament within the meaning of the aforesaid Act, the respondent contended that the said apportionment was correct and fair and in accordance with the provisions of the Act.

On behalf of the respondents, the Assessment Committee, it was contended that the decision of the said Assessment Committee as to apportionment was correct and fair, and in accordance with the provisions of the said Act.

The Recorder decided in favour of the appellant occupiers' contentions and gave judgment in favour of the appellants with costs against the respondent the Revenue Officer. Having held in the first appeal that the hereditament was an industrial hereditament the Recorder further decided that the said hereditament was wholly industrial and that the assessment thereof ought not to be apportioned under the provisions of s. 4 of the said Act.

The questions upon which the opinion of the Court was desired were :—

1. Whether on a true construction of sub-s. 1 of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, and on the facts proved and admitted at the hearing of the first and second appeals the Recorder was entitled to hold as he did—namely :—

On the first appeal : That the hereditament referred to was an industrial hereditament and had been properly included as such in the Special List ; and

On the second appeal : That in such Valuation List the said hereditament should be regarded and treated as wholly industrial and that no apportionment under s. 4 of the aforesaid Act should be made.

AREA OF EACH FLOOR AND DESCRIPTION OF USER.

Total Area of Floor in square feet.		Printing, Composing, Engraving, etc. sq. ft.	Publishing, Circulating. sq. ft.	Editorial. sq. ft.	Accounts, Manager, etc. sq. ft.	Remarks.
7647	Basement . .	7647	—	—	—	Printing Presses, Stereo Casting.
7322	Ground Floor .	—	3963	—	—	Publishing, Circulating.
		—	—	—	3359	General Offices, Board Room, etc., Accountants, etc.
4410	First Floor .	4410	—	—	—	Composing Room, Readers Room, Block Room.
4253	Second Floor .	150	—	—	—	Creed Room.
		—	—	4103	—	Editorial.
3635	Third Floor .	1006	—	—	—	Advertisement Composing, Rooms.
		1152	—	—	—	Mess-room and Cook-house
		—	—	1477	—	Editorial.
5271	Fourth Floor .	2040	—	—	—	Process Engraving.
		400	—	—	—	Electrical, etc., Store.
		—	—	—	1302	Filing Department, etc.
		—	1529	—	—	" Returns " Stores.
		16,805				=51·6% Printing, Composing, Engraving, etc.
			5492			=16·9% Publishing, Circulating, etc.
				5580		=17·2% Editorial.
					4661	=14·3% Accounts, Manager, etc.
32,538	Total square feet of Floor Space (as agreed).					100·0%

Sir William Jowitt A.-G. and *Wilfrid Lewis* for the appellant, the Revenue Officer, in both cases. These appeals should be allowed. The object of the legislation under consideration is to derate productive industry and not to derate business premises generally: per Lord Sands in *Inland Revenue* v. *Gunn, Collie and Topping.* (1) The production

(1) 1930 Sc. L. T. 296, 298.

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of a newspaper is not productive industry. From one point of view a newspaper is a thing that can be physically held in the hand. But the more correct view is that the paper and print are merely the medium by which news, editorial views and advertisements can be brought to the minds of readers. In the Newspaper Libel and Registration Act, 1881, s. 1, a newspaper is defined as "any paper containing public news, intelligence, or occurrences, or any remarks or observations therein printed for sale, and published . . . . periodically. . . . ." It is altogether too narrow to regard the work of the producer of a newspaper as merely that of a man who adapts a piece of paper for sale with print on it. True, that that part of the premises where the actual printing is done may be a factory, but, whereas, in the case of a factory, the primary object is to produce a physical article, the printing that is done in a newspaper office is purely ancillary to the main purposes for which the premises exist. The purposes of the printing have to be remembered: *Stoke-on-Trent Revenue Officer* v. *Stoke-on-Trent Assessment Committee* (1), and here it is clear that the premises were primarily occupied and used for the purpose of offices and/or for purposes in respect of the general direction and management of newspapers and/or for editorial or other purposes and for the purposes of the collection and dissemination of news and advertisements, such purpose not being the purposes of a factory or workshop, also for the purposes of a distributive wholesale business.

With regard to the question of apportionment, in *George Outram & Co., Ld.* v. *Inland Revenue* (2), which was a case of a newspaper office, the Scottish Court held that part of the premises was devoted to the managerial, editorial and clerical staff of the newspaper and was not used in connection with the manufacturing process carried on in the premises, and that a case had been made out for an apportionment. That decision was right and should be followed in the present case. By s. 4, sub-s. 2 (*a*), of the Rating and Valuation (Apportionment) Act, 1928, for the purpose of

(1) (1930) 46 Times L. R. 434.

(2) 1930 Sc. L. T. 303.

apportionment, a "hereditament shall be deemed to be occupied and used for industrial purposes except in so far as any part thereof is, under this Act or under the enactments relating to the regulation of mines, factories and workshops, to be deemed neither to be, nor to form part of, a mine, factory or workshop." Sect. 149, sub-s. 4, of the Factory and Workshop Act, 1901, provides that "where a place situate within the close, curtilage or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that place shall not be deemed to form part of the factory or workshop for the purposes of this Act." In *Lewis* v. *Gilbertson & Co., Ld.* (1), Lord Alverstone C.J. said that the words "place situate within the close, curtilage or precincts forming a factory" in the latter subsection point to an area separate from the area of the factory. That condition is satisfied here.

[*Taylor* v. *Hickes* (2); *Hardcastle* v. *Jones* (3); and *Vines* v. *Inglis* (4) were also referred to.]

Comyns Carr K.C. and *William C. Howe* for the respondents in both cases. These premises constitute a factory within the Factory and Workshop Acts, 1901–1920, and they are, therefore, an industrial hereditament within s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928. There is no difference between a newspaper and the process by which it is manufactured and any other manufactured article and the process by which it is manufactured merely because intellectual processes contribute in perhaps a greater, or more constant, degree to the manufacture of a newspaper than they do to that of other articles. In the present cases, whether judged by floor-space, value, or proportion in numbers and in earning power, the mechanical side of the business shows a large preponderance over the intellectual side. Therefore, the primary purposes for which the respondents' premises are used—which need not be the primary purposes of their business—are mechanical. As to the test of use, a watch is clearly a manufactured article, but, like a newspaper, its sole use is to be looked at to inform the mind of certain facts. The place where a watch is made is a factory, and a "letterpress printing works" is a non-textile factory within the Factory and Workshop Act, 1901: see Schedule VI., Part I. (17.). So also are foundries and metal works: ibid. (12.) and (13.). The present case is distinguishable from *Stoke-on-Trent Revenue Officer* v. *Stoke-on-Trent Assessment Committee.* (1) There the work was done that the article produced might be used by the owners of the factory in their trade. Here the work is done that the article produced may be sold.

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(1) (1904) 91 L. T. 377, 379.

(2) (1862) 12 C. B. (N. S.) 152.

(3) (1862) 32 L. J. (M. C.) 49.

(4) 1915 S. C. (J.) 18.

With regard to the apportionment, the whole of the respondents' premises constitute a factory engaged in the manufacture of a newspaper, and the Scottish Court was wrong when, in *George Outram & Co., Ld.* v. *Inland Revenue* (2), they decided that the editorial and administrative offices should be severed from the rest. If that decision were right, the counting-house, manager's room, and so on, would have to be excluded in determining what was and what was not a factory within the Factory Acts, but that is not so. If all rooms where actual manufacture is not being carried on are to be taken out of the 1928 Act, s. 3, sub-s. 2, which excepts from the operation of the Act garages and stables, is unnecessary. As shown by *Lewis* v. *Gilbertson & Co., Ld.* (3), and *Hardcastle* v. *Jones* (4), the whole principle of factory legislation has been that, once premises are within the Acts, the whole premises are within the Acts, unless they come within some special exception. A decision under the Act of 1928 in accordance with the contention of the Attorney-General limiting the extent of the factory to a portion only of the hereditament would have very serious effects, because it could not be confined to the administration of the Act of 1928, but must apply also to the administration of the Factory and Workshop Act. The Attorney-General had to rely upon s. 149, sub-s. 4, of the Factory and Workshop Act, 1901, in support of his contention, and therefore a construction of that section in accordance with his contention must apply to all factories. It has not been the practice of the Courts to cut down the application of the Factory Acts. The intention of the Legislature was that factory inspectors should have the right of inspecting the whole of a factory, which right they would not have if the contention of the Attorney-General is upheld. For a part of premises to be non-industrial within s. 149, sub-s. 4, of the Factory and Workshop Act, 1901, it must be quite apart from the place where the manufacturing or handicraft is carried on. *Vines* v. *Inglis* (1) is distinguishable. What was done there on one floor of the premises was wholly different from what was done on the other floors.

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(1) 46 Times L. R. 434.

(2) 1930 Sc. L. T. 303.

(3) 91 L. T. 377.

(4) 32 L. J. (M. C.) 49.

Wilfrid Lewis replied.

AVORY J. The first of these cases that was argued before us was the case of the *Revenue Officer* v. *Cardiff Assessment Committee and the Western Mail, Ld.*, and a cross-appeal by the *Western Mail, Ld.* v. *Cardiff Assessment Committee and the Revenue Officer*. In that case the premises which were in question are described as "shop, offices, printing works and appurtenances, 69 St. Mary Street," Cardiff. Of those premises the Western Mail, Ld., are the occupiers. That hereditament was included in the Special List as an industrial hereditament, and an apportionment was made by the Cardiff Area Assessment Committee as follows: "Net annual value for industrial purposes 990*l.* Net annual value for non-industrial purposes 710*l.*" The Revenue Officer lodged an appeal to Quarter Sessions against the decision to include the hereditament in the Special List, and, on the other hand, the Western Mail, Ld., lodged an appeal to Quarter Sessions against the decision to apportion the assessment of the hereditament in the manner described. The result of the appeal to Quarter Sessions was that the learned Recorder held that the hereditament was an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Act of 1928; he also held that the hereditament was wholly industrial and that there ought not to be any apportionment. The questions which are submitted to the Court in that case are whether upon a true construction of sub-s. 1 of s. 3 of the Act of 1928, and on the facts proved and admitted the learned Recorder was entitled to hold that the hereditament was an industrial hereditament, whether if so it should be regarded and treated as wholly industrial and that no apportionment under s. 4 of the Act should be made.

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(1) 1915 S. C. (J.) 18.

The Attorney-General in arguing this case on behalf of the appellant, the Revenue Officer, has invited the Court to say that this hereditament is not an industrial hereditament within the meaning of the Act of 1928 on the ground that it is primarily occupied for a purpose which is not a factory purpose, in other words, that it comes within the proviso to sub-s. 1 of s. 3 as being primarily occupied and used for some other purpose which is not that of a factory or workshop under sub-para. (*f*) of that proviso; and he has invited the Court to say that the primary purpose for which these premises are occupied is for the dissemination of news, in other words, that the object is to provide food for the intellectual faculties of the readers of the newspaper. The idea is picturesque, but in my opinion absolutely irreconcilable with what I know, and what I believe to be common knowledge, of the purposes for which the modern newspaper is printed and published.

In order to determine whether the hereditament is primarily occupied for purposes which are not those of a factory or workshop we have to turn to the provisions of the Factory Act. These premises are in fact registered as a factory; they are expressly included in Part I. of the Sixth Schedule to the Factory Act as being "premises in which the process of letter-press printing is carried on." Quite apart from the general provisions of the Factory Acts, they are ipso facto a factory. The case states that the whole of the premises are registered as a factory. That is not conclusive; as has been shown by previous decisions of this Court, the mere fact that the premises are specifically within the Schedule to the Factory Act is not of itself sufficient to show that they are primarily occupied for a factory purpose; they may be primarily occupied for some other purpose than a factory purpose although they are specifically within the Act.

Now looking at the general provisions of the Factory Act we find that the expression "non-textile factory" is defined in s. 149 as meaning "any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—(i.) the making of any article or of part of any article; or (ii.) the altering, repairing, ornamenting or finishing of any article; or (iii.) the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there." Now I cannot myself doubt that the composing, printing and publishing of a newspaper such as the one in question here comes within the precise words which I have read from s. 149. I think it is impossible to say that the composing, printing and publishing of a newspaper is not the making of an article and the adapting for sale of an article; and that that is done by way of trade or for purposes of gain I think is equally incontrovertible.

For these reasons I have come to the conclusion that in this case the primary purpose for which this hereditament was occupied and used by the Western Mail, Ld., was a factory purpose within the meaning of the Act, and therefore that the learned Recorder rightly held that it was an industrial hereditament which properly should be put in what is called the Special List.

The same considerations apply in the second case that was argued before us of the *Revenue Officer* v. *David Duncan & Sons, Ld., and the Cardiff Assessment Committee* in which a similar conclusion was arrived at by the learned Recorder on both points—namely, that the hereditament was an industrial hereditament and that there should be no apportionment. My judgment in that case is the same on the first point.

Upon the second point which is raised in the cross-appeals I think, with all respect to the learned Recorder, that he was wrong in both the case of the *Western Mail, Ld.*, and in the case of *David Duncan & Sons, Ld.*, in holding that there should be no apportionment. I think in both of those cases there should be under s. 4, sub-s. 2, of the Act of 1928 an apportionment of those parts which are occupied and used for industrial purposes as distinguished from those which are used for other purposes.

I am unable to find any better rule or principle for determining the distinction between the portions which are used for industrial purposes and those which are used for other purposes than is to be found in the decision of the Scottish Court in the case of *George Outram & Co., Ld.* v. *Inland Revenue* (1), which was decided on January 21 of this year. That was a case which related to newspaper offices in which the Court was saved the difficulty of determining the details of the portions of the premises which were to be included as industrial from those which were not, because in that case certain portions of the premises only were registered under the Factory and Workshop Acts, and the Court held that those portions only which were registered under the Factory and Workshop Acts had been properly included as being used for industrial purposes as distinct from the other purposes. But it is useful to observe that those portions which were excluded in that case were devoted to the accommodation of the managerial, editorial and clerical staff, and, on the facts stated, were not used in connection with the manufacturing process that was carried on in the premises in question. Lord Sands in his judgment said (2): " It appears to me that what is done in the editorial part of these premises exactly answers that description "—namely, as a place situate within the close, curtilage, or precincts forming a factory or workshop which is used solely for some purpose other than the manufacturing process or handicraft carried on in the factory; and he proceeds: "I think that we get into exceedingly difficult and dangerous ground if, in determining what is a factory, we depart from the ordinary conception of mechanical operations conducted in a manufacturing industry and try to include other operations which are of an entirely different nature."

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(1) 1930 Sc. L. T. 303.

(2) 1930 S. C. L. T. 306.

The difficulty of determining which portions of the premises should be deemed to be occupied and used for industrial purposes as distinguished from the other portions arises from the provision of sub-s. 2, para. (*a*), of s. 4 of the Act of 1928, which provides that "The hereditament shall be deemed to be occupied and used for industrial purposes, except in so far as any part thereof is, under this Act or under the enactments relating to the regulation of mines, factories and workshops, to be deemed neither to be, nor to form part of, a mine, factory, or workshop." No question arises here whether under this Act any part is excluded, because s. 3, sub-s. 2, which deals with that, only has reference to stables and garages. But when we inquire whether some portion of these premises is to be deemed neither to be nor to form part of a factory or workshop, we are thrown back upon a consideration of sub-s. 4 of s. 149 of the Act of 1901, which provides that "Where a place situate within the close, curtilage or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that place shall not be deemed to form part of the factory or workshop for the purposes of this Act, but shall, if otherwise it would be a factory or workshop, be deemed to be a separate factory or workshop and be regulated accordingly."

I quite appreciate the difficulty which has been pointed out by Mr. Comyns Carr that the effect of holding under s. 4 of the Act of 1928 that any portions of these premises do not form part of the factory may create difficulties and conflict with the duties of the factory inspector when he finds that the whole premises are registered as a factory. But none the less it appears to me that we are bound to give effect to the provisions about apportionment contained in

s. 4, and, as I have said, the only general principle which I think is to be used as a guide is the principle which was laid down by the judges in the Scottish case of *George Outram & Co., Ld.* v. *Inland Revenue.* (1)

In that view it is necessary that both of these cases should be remitted to the learned Recorder to determine upon those principles which portions of the premises as they are set out in the schedules to each of the cases should be excluded as not being used for industrial purposes. My opinion is that in each of these cases the items which are included under the head of "Printing, composing, engraving, etc.," are all clearly used for industrial purposes, with the exception in the *Western Mail* case of the item of 270 sq. feet which is described as a "canteen," and in the *David Duncan* case with the exception of the item of 1152 sq. feet which is described as "mess-room and cook-house," and the item of 400 sq. feet described as "electrical, etc., store" which have been placed in the first column. With regard to the second column, which is headed "Publishing and Circulating," prima facie I think in the *Western Mail* case the item of 1611 sq. feet described as "Returns Stores" should be excluded. The next item of 2000 sq. feet, which is described as "Publishing and Circulating," prima facie should be included subject to any exception that may be found as to any portion of that part of the premises which is called "Publishing and Circulating Department." The next item of 3157 sq. feet, which is described as "Advertising," should be excluded, and the items in the third, fourth and fifth columns admittedly should be excluded. In the case of *David Duncan & Sons, Ld.*, I have already dealt with two items in the first column which I think prima facie should be excluded. In the second column the item of 3963 sq. feet described as "Publishing, Circulating" should be included subject, as I have said, to the exception that may be taken there. The next item of 1529 sq. feet described as "Returns Stores" must be excluded. Items in the third and fourth columns in that case also should be excluded.

(1) 1930 Sc. L. T. 303.

The result is that the appeals of the Revenue Officer will be dismissed on the main point and will be allowed on the question of apportionment.

TALBOT J. I am of the same opinion.

There are two questions on these appeals: First, is the hereditament an industrial hereditament within the meaning of the Act of 1928? Secondly, if so, is its annual value to be apportioned in the Valuation List under s. 4 of the Act? I think there can be no doubt that prima facie it is an industrial hereditament. It is used and occupied solely for the purpose of producing and selling certain articles—namely, newspapers. In the building the matter is prepared and arranged and the printing, folding, cutting, etc., is done. The result of those operations is the production of complete articles—namely, newspapers ready for sale. When they have been sold, the respondents, the company, have no more to do with them. It is quite immaterial to them what those who buy the papers do with them. Those circumstances appear to me to make the premises prima facie premises occupied and used as a factory in view of s. 3, sub-s. 2, of the Act of 1928, by which we are referred to s. 149 of the Factory and Workshop Act, 1901. There is a particular exception which that sub-section of the Act of 1928 enacts, and another qualification has been introduced later. But subject to that the expression "factory" has the same meaning as in the Factory and Workshop Acts.

The material section of those Acts is s. 149 of the Act of 1901, by which a "factory" is said to mean "textile factory and non-textile factory or either of those descriptions of factories." Non-textile factories are divided into three categories, the first of which includes any place named in Part I. of the Sixth Schedule, which contains the item "letter-press printing works, that is to say, any premises in which the process of letter-press printing is carried on." The second category includes certain premises or place named in Part II. of that Schedule. The third category deals with other premises which are factories but are not specified in either

Parts I. or II. of the Sixth Schedule. Although these particular premises come within Part I. of the Sixth Schedule it is essential to look at the wording of para. (*c*) in order to see what the statute defines as the essentials of a factory. That paragraph provides as follows: "Any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely, (i.) the making of any article or of part of any article; or (ii.) the altering, repairing, ornamenting or finishing of any article; or (iii.) the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there." It is the first words which indicate what the class of thing is which those who are responsible for the statute say constitutes a factory.

It was argued here on behalf of the appellant, the Revenue Officer, as a ground of the appeal, that these premises are primarily occupied and used for purposes which are not those of a factory. As I have said, prima facie they appear to correspond with the description of a factory.

The argument, as I understand it, is put somewhat in this way: a newspaper, which is the article or commodity produced on these premises, is quite different from any other manufactured article or at any rate from the great majority of manufactured articles, inasmuch as the essence of it is the matter conveyed in the newspaper and not the printed paper which conveys it, or, which is perhaps the same thing in other words, the business of a newspaper owner is not primarily adapting sheets for sale by printing them, that is to say, the mere production of the printed page, but the publication of news.

It is argued that the cases recently decided in this Court —the case of the *Potteries Electric Traction Co.* (1) and the *London County Council* case decided a few days ago— are analogous; and that inasmuch as the purpose is the publication of news or the conveying of news, that is a

(1) *Stoke-on-Trent Revenue Officer* v. *Stoke-on-Trent Assessment Committee* 46 Times L. R. 434.

purpose other than the purposes of a factory or workshop, and therefore prevents this place from being an industrial hereditament. I think that the argument really involves a confusion: the distinction in those cases was between the way in which the premises were used and occupied—namely, as a factory, and the purpose for which the occupier intended to use articles made there, and which therefore constituted the purposes for which the premises were used and occupied by him. It will be noticed that all the purposes which are mentioned in the proviso to the section which introduces the qualification relied upon, are purposes for which the occupier himself wants and makes the thing manufactured; that is to say, the specific purposes enumerated (*a*), (*b*), (*c*), (*d*) and (*e*), all fall within that description. Then it goes on: "any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop." In order to come within the exception it is not necessary that they should be similar purposes, but in my opinion they must be purposes for which the occupier desires to use the article which he makes.

In this case when the occupier has sold the newspaper he has no more to do with it; he does not use it at all; by the mere sale he has accomplished his object, at any rate he has done all that he can do to accomplish his object. The analogy would be, for example, in the *Potteries Electric Traction Co.'s* case (1), if the company, instead of running omnibuses, had sold omnibuses. It could not then be disputed, and in fact it was admitted, that the factory which was in question in that case would have been entitled to the benefit of this Act. Of course the use to which he hopes the buyer will put the newspaper when he has bought it is, in one sense, the object of the newspaper proprietor's operation, but he has no control over that use; and in my opinion it is not the purpose for which he occupies or uses the hereditament within the meaning of the proviso to s. 3, sub-s. 1, of the Act of 1928. I think if that sort of consideration were admissible it would lead to inquiries which would

(1) 46 Times L. R. 434.

be really impossible and to distinctions which would be quite unreasonable. You would have to inquire—and I think that illustrates the fallacy of the argument—into the motive with which newspaper proprietors carry on their business. No doubt there are newspaper proprietors whose principal object, the object with which they go into the business, is the promotion of a particular opinion, whether political or social or religious, or any other; others merely wish to make money like any other manufacturer; they print and publish what they think will sell best, without any regard to the effect on the minds or the morals of their readers. Others, probably the majority, carry on their business for motives which are compounded in varying proportions of those two. But it seems to me that that is a question of motive, which is a totally different question from the question of purpose, the word used in this statute. As soon as one finds that the premises are used as a factory, and not used to produce things wanted by the occupier to be used for other than factory purposes, it is quite immaterial what the motive is with which the occupier carries on the factory, and quite immaterial to what use the buyer puts the product of the factory, or why he buys it.

Then it was said that the mere printing of the paper, the mechanical manual part of the business, is only a minor part of the manufacture of the newspaper, and that the other and more vital part is the composition and arrangement of what is to be printed. That certainly is true, but the result of all that is the manufactured article which the factory turns out and the customer buys. For my own part I cannot see how that makes the premises any the less used as a factory; it merely shows that this particular manufacture is conducted in a particular way; and it remains true that the result of it all is the production of an article for sale.

Then the question remains as to the apportionment. The learned Recorder has held that this hereditament was occupied and used wholly for industrial purposes, subject to the margin of 10 per cent. for other purposes, which is allowed by the Act. He has consequently not apportioned the value of the hereditament at all. The legislation on this point is somewhat involved, and it obliges any one who wishes to arrive at a conclusion as to its meaning to follow it out through several stages. It is necessary first of all to see whether the place is an industrial hereditament that is used and occupied as a factory, and not primarily used for other purposes which are not those of a factory. It is then necessary, when dealing with apportionment, to look at s. 4, which deals only with industrial hereditaments. Sect. 4 deals with the apportionment of the value of an industrial hereditament, and it obviously contemplates that some industrial hereditaments will be wholly, and some only partly, occupied and used for industrial purposes.

The Legislature proceeds to explain what it means. It does that by sub-s. 2 of s. 4, which provides that "For the purpose of determining in what proportions an industrial hereditament is occupied and used for industrial purposes and for other purposes respectively"—of course that is confined to hereditaments which are used partly for industrial purposes and partly for other purposes—"the following provisions shall have effect:—(*a*) The hereditament shall be deemed to be occupied and used for industrial purposes except in so far as any part thereof is, under this Act or under the enactments relating to the regulation of mines, factories and workshops, to be deemed neither to be, nor to form part of, a mine, factory or workshop."

That means, I think, that if a hereditament is an industrial hereditament, prima facie it must be assumed that every part of it is of that character. Of course we are dealing here with a case where some parts of the hereditament are not occupied and used for industrial purposes, but as to any single part one starts with the assumption that it is occupied and used for industrial purposes, except in so far as it is, under the legislation, to be deemed not to be part of a factory.

That refers, first of all, to s. 3, sub-s. 2, of this Act, which deals with garages, coach-houses and stables, with which we are not concerned here. Then it refers to sub-ss. 3

and 4 of s. 149 of the Factory and Workshop Act, 1901. We are here concerned with sub-s. 4. There is no doubt that we are necessarily embarrassed in dealing with this matter to some extent, and perhaps in another way assisted by the fact that the Factory Act of 1901 has objects wholly different from those of this Act, which we are construing here. The Factory Acts were, putting it shortly, passed in order to secure that the conditions of those who are employed in factories and workshops should be as favourable as possible for their health and comfort. Here, of course, we are dealing with a different matter. But none the less this question, whether any part of an industrial hereditament is or is not used for industrial purposes, is, by the Act of 1928, governed absolutely by the question whether under the Factory Acts it is or is not to be deemed to be part of the factory. Sub-sect. 4 of the Act of 1901 has been read several times, and it says this: "Where a place situate within the close, curtilage or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that place shall not be deemed to form part of the factory or workshop for the purposes of this Act." Then there is a provision about a separate factory which itself fulfils the description of a factory. The language there is special, and it is to be noted that it does not say "solely used for some purpose not connected with a factory," or "other than those of a factory," but "solely used for some purpose other than the manufacturing process or handicraft carried on in the factory." What is done in the factory is the test, and not its connection with the general purposes; and it differentiates, I think, according to the natural construction of the words, between the process itself and everything in the way of mental or clerical work. However essential such mental or clerical work may be, it is no part of the actual mechanical or manual process which has physically created the thing that is sold. That is what I think is meant by the words of Lord Sands, which have been read in *George Outram & Co., Ld.* v. *Inland Revenue* (1): "I think that we get into exceedingly difficult and dangerous ground if, in determining what is a factory, we depart from the ordinary conception of mechanical operations conducted in a manufacturing industry and try to include other operations which are of an entirely different nature."

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(1) 1930 Sc. L. T. 303, 307.

I think, as was said in argument, that one has to bear in mind in construing this definition as applied to this Act that it must have the same meaning as in the Factory Act itself and for the purposes of the Factory Acts, and therefore in its application to this Act one has to consider the object with which the Factory Acts were enacted and in connection with which this definition was enacted. I think it is clear when that is taken into account that there is nothing unreasonable in the definition, but on the contrary it is what one would expect: that cases should not be included as coming within the Factory Acts in which those Acts would be, ordinarily speaking, not wanted, and in which the Legislature might well consider that no legislation was needed for such things as ventilation, cubic space, hours, etc. It is quite true, of course, that if the clerical work which is done at a factory is excluded as not coming within the purview of the Factory Acts those who work as clerks or typists may be subjected to some insanitary and uncomfortable conditions. But that equally applies to the people who are doing the same work in hundreds and thousands of places, which the Legislature has not thought fit to interfere with in this way. I think, looking at the object of the Factory Acts and limiting the definition in the way which appears to me to be the natural meaning of the words, it fits in with the policy of the Legislature as expressed in the Factory Acts. If the definition were not limited in some way of that kind, in the great majority of factories probably there would be no possibility of apportionment at all under this statute of 1928, because in most cases everything in the factory is connected with, and exists for the purposes of, the manufacture; especially having regard to the 10 per cent. margin.

Forming the best opinion I can on the construction of this Act, I think that Parliament in conferring this boon on industry has limited it to the part of the premises used directly for the actual industrial process; and I think in coming to that conclusion we have the direct authority of the judgment of the Court in Scotland in *Outram's* case. (1) I agree, therefore, that the appeals must be dismissed as to the first point and allowed as to this point.

I do not wish to add anything to what has been already said about the details of the apportionment, but I would add one thing with the consent of my brother Avory. I think that what he said with regard to the mess-room and cook-house in the case of *David Duncan & Sons* may not have been wholly unambiguous. I have his authority for saying this, and it is also my own view; I do not think that he intended to say that the mess-room and cook-house necessarily came out of the industrial part of the building. Whether they do or not must depend upon the persons for whose accommodation they are provided and used: according to whether they relate to the industrial part, the factory proper, if I may use the term, or to the clerical and editorial part of the hereditament.

FINLAY J. I am of the same opinion. I will only add a few words on each of the points. With regard to the first point, it was argued on the part of the Crown that that depends upon the proper construction of s. 3 of the Act of 1928 as applied to the facts of the case. The question really is whether this hereditament is an industrial hereditament, and that in turn depends upon whether it comes within the proviso which says that "the expression 'industrial hereditament' does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for" certain specific purposes, among those being "any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

The question on that part of the case depends really upon whether this hereditament is one where "manual labour is exercised by way of trade for purposes of gain, in or incidental to" the purpose of "the making of any article or of part of any article." In regard to that it seems to me clear, in spite of the most able argument to the contrary, that this place is used for the purposes of the making of an article—namely, a newspaper. I cannot think that it makes any difference that intellectual effort, no doubt of very varying quality, goes to the making of that article; none the less an article is made, and is made there for sale. Still less does it seem to me that one can possibly attempt to go into questions of motive. One cannot consider what is the motive (no doubt they are mixed motives) with which any person chooses to make and to sell a newspaper; nor can one consider why people buy newspapers or what they do with them. For myself I am unable to follow the argument by which it is sought to show that because the life of a newspaper as a newspaper is ephemeral, because it is bought for the purpose of looking at the news, it may be only for a very short time, therefore that shows that the newspaper could not be regarded as an article and made for sale. On that part of the case I do not think that there is any real difficulty, and I entirely concur in the view taken by my brothers.

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(1) 1930 Sc. L. T. 303.

No doubt more difficulty arises on the second part of the case, that relating to apportionment. The difficulty arises partly from the somewhat confused state of the legislation and partly from the difficulty of applying a scheme of legislation of this sort to the varying things which go to make up a place such as that with which we have to deal. This question depends upon s. 4 of the Act of 1928. That section makes perfectly clear what, apart from that section, might not have been very obvious, that there may be an industrial hereditament within the definition of that term in s. 3, which nevertheless may, as to a large part of it, not be used for industrial purposes at all. That of course lies at the root of the scheme of the section, and where one finds that a hereditament is an industrial hereditament, but that certain parts of it are used for purposes other than industrial purposes, then subject to a provision with regard to 10 per cent.

—with which I need not deal—an apportionment becomes necessary.

I think that the law is correctly laid down by the Scottish Court in the case of *George Outram & Co., Ld.* v. *Inland Revenue.* (1) That was a case very similar to the present one. It related to a very well known paper in Scotland, the "Glasgow Herald," as this case relates to a very well known paper in South Wales. Of course the general processes pursued in the manufacture of papers of this sort must inevitably be very similar. In the Scottish case the Court had an advantage which has been denied to us, because certain parts of the premises there had, as it was expressly found, been excluded from registration under the Factory and Workshop Acts; and it is worth noting, because it may afford some guidance to those who have to consider these matters from a practical point of view, that one department in the "Glasgow Herald" office was called the despatch department, and that department was not excluded from registration under the Factory and Workshop Acts, with the result, of course, that in that case the Scottish Lords of Session accepted the view that the despatch department was a part of the industrial hereditament and was not excepted from it. That is a matter of detail; I mention it only because it may possibly afford some assistance to those who have to grapple with this matter from the point of view of detail. The principle appears to be laid down in all the judgments, but perhaps most clearly in the passage in the judgment of Lord Sands from which my brother Avory quoted. Accepting, as we do, that decision, and desiring to follow it, it only remains to apply it to the facts of this case. With regard to the general principle, the line to be drawn is clear enough: it is the line between the manufacturing process on the one hand, and other things not part of the manufacturing process on the other. Some of the things seem to be clear enough; the editorial department obviously falls outside the manufacturing process. With regard to the questions which are doubtful I do not desire

(1) 1930 Sc. L. T. 303.

to add anything to what has been said. I concur exactly with the view that has been expressed by my brother Avory, amplified on one point as it was by my brother Talbot. I therefore concur entirely in the judgment.

1930

CARDIFF REVENUE OFFICER *v.* CARDIFF ASSESSMENT COMMITTEE.

In both cases, appeal of the Crown dismissed as to the first point but allowed as to the second point.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondents: *Ingledew, Sons & Brown, for Ingledew & Sons, Cardiff.*

R. F. S.

ATTORNEY-GENERAL *v.* FARRELL AND ANOTHER.

C. A.

1930

July 15, 16, 17.

Revenue—Estate Duty—Disentailing Deed and Resettlement under Joint Power of Appointment—Disposition of Tenant in Tail—" Property to be included in an account "—Discretionary Trust—Reservation of Interest —Customs and Inland Revenue Act, 1881 (44 *&* 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*c*)*—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 22, *sub-s.* 2 (*b*).

By a resettlement dated September 27, 1894, made in exercise of a joint power of appointment reserved to A. and his mother by a disentailing deed of even date by which A. disentailed certain property with his mother's consent and she joined to convey her life interest, they resettled the property reserving to themselves an overriding joint power of appointment; and under the joint power of appointment they made another resettlement dated January 17, 1896, by which they appointed the property to trustees upon trust for the mother for life and after her death upon trusts for management during the life of A. and after payment of expenses to apply the net rents and profits for the benefit of any one or more exclusively of the other or others of A. and his wife and children or remoter issue as the trustees should in their absolute discretion think fit and (subject to this discretionary trust) to pay or apply the surplus of the rents and profits to the person or for the purposes to or upon which the same would be payable or applicable if A. were dead and after his death and in the events which happened the trustees were directed to hold the trust estate in trust for A.'s brother for life with remainders over.

The mother died in 1925 and estate duty was paid on her death on the settled property. A. died in 1926, having since his mother's death received 50*l.* a month from the trustees under the discretionary trust. The surplus profits, which were considerable, had been paid to A.'s brother:—

Held, (1.) that property settled in exercise of a power of appointment by deed is "property" within the meaning of s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, as enacted in an amended form by the Finance Act, 1894, s. 2, sub-s. 1 (*c*).

(2.) that having regard to s. 22, sub-s. 2 (*b*), of the Finance Act, 1894, the dispositions made by the disentailing deed and resettlements to take effect after the death of the mother were dispositions made by A. as settlor for the purpose of the Finance Act, 1894.

(3.) that by making himself one of the possible objects of the discretionary trust, A. had reserved to himself an interest in the property settled within the meaning of s. 38, sub-s. 2 (*c*), of the Act of 1881 as re-enacted in an amended form in the Finance Act, 1894.

Attorney-General v. *Heywood* (1887) 19 Q. B. D. 326 followed.

(4.) that the stocks representing the proceeds of sale of real estate in the Irish Free State subject to the trusts of the resettlement of 1896 were therefore property which must be deemed to have passed on the death of A. under the Finance Act, 1894, s. 2, sub-s. 1 (*c*), so as to be chargeable to estate duty.

Decision of Rowlatt J. [1930] 1 K. B. 539 affirmed.

APPEAL from the decision of Rowlatt J. (1) on an information filed by the Attorney-General on behalf of His Majesty.

By the will of Mathew Elias Corbally dated September 21, 1865, and in the events which happened, certain funds representing the proceeds of sale of real estate situated in the Irish Free State and other funds directed to be applied in the purchase of real estate in Ireland, were, at the date of the next mentioned disentailing deed (September 27, 1894), vested in trustees upon trust to pay the income to Lady Mowbray and Stourton (herein called "the Baroness") for life with remainder to her second son Alfred (referred to throughout these proceedings as "the deceased") in tail male with remainders over. The Baroness had power to charge the premises with sums not exceeding 5000*l*. for portions for her younger children.

By a disentailing deed dated September 27, 1894, the Baroness and the deceased conveyed all the freehold hereditaments comprised in the will, or purchased thereunder, to G. R. Dean free from the estate tail and all remainders taking effect thereafter to such uses and upon such trusts and with and subject to such powers and provisions as the

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(1) [1930] 1 K. B. 539.

Baroness and the deceased should by deed jointly appoint and the stocks and funds mentioned in the second schedule thereto and all other money stocks or funds liable to be laid out in the purchase of hereditaments to be settled as aforesaid were assigned to G. R. Dean (freed as aforesaid) upon such trusts and subject to such powers and provisions as the Baroness and the deceased should by deed jointly appoint.

By a resettlement dated September 27, 1894, the Baroness and the deceased in exercise of their powers under the disentailing deed appointed the manors, lands, tenements and hereditaments comprised in the disentailing deed upon trust during their joint lives to pay to the deceased the yearly sum of 500*l.* determinable on bankruptcy or alienation, and from the date of his marriage with the consent of the Baroness a further yearly sum of 300*l.* determinable in like manner, and subject thereto the trust estate was to be held on trust for such persons and purposes as the Baroness and the deceased should by deed jointly appoint and in default of appointment in trust for the Baroness for life in restoration of her life estate under the said will and the powers annexed thereto other than the power of appointing 5000*l.* for portions with remainder in trust for the deceased for life with remainder in trust for his first and other sons successively in tail male with divers remainders over. By the same resettlement the Baroness and the deceased in exercise of their powers under the disentailing deed, after appointing that the sums there mentioned should be raised in favour of the deceased and of younger children, declared that the trustees were to hold the residue of the trust funds as the Baroness and the deceased should by deed jointly appoint with further directions in default of appointment as therein mentioned so that the capital moneys should be impressed with a trust for the purchase of freehold hereditaments and should devolve as real estate.

By a resettlement dated January 17, 1896, the deceased in consideration of the application of 7000*l.* to be raised out of the trust funds in payment of his debts released the trust estate from the payment of the above annuities of 500*l.* and

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300*l.* and the Baroness and the deceased appointed that the trustees should during their joint lives or until the bankruptcy of the deceased or any of the other events therein mentioned pay to the deceased an annuity of 300*l.* with a discretionary trust in the event of his bankruptcy or any other of the other events aforesaid and upon further trust if during the continuance of the annuity of 300*l.* the deceased should marry with the consent of the Baroness to raise and pay the further yearly sum of 300*l.* to be determinable in like manner and subject to these annuities and certain other payments the trustees were to hold the trust estate on trust for the Baroness for life in restoration of her life estate under the will and resettlement dated September 27, 1894, and after the death of the Baroness upon trust to take the profits of the trust estate and manage the premises during the life of the deceased and to apply the net profits after payment of expenses and costs of management for the maintenance or benefit of any one or more to the exclusion of the others of the following persons—namely, the deceased and his wife and children or remoter issue for the time being in existence and (if for the time being there should be no such wife or child or other issue) the other persons for the time being entitled in remainder in such manner in all respects as the trustees should in their absolute and uncontrolled discretion think fit and (subject to the said discretionary trust) to pay or apply the surplus of the rents and profits of the said trust estate to the person or persons or for the purposes to or upon which the net rents and profits would be payable or applicable if the deceased were dead and from and after the death of the deceased it was thereby directed that the trust estate should be held in trust (in the event which happened of the deceased dying a bachelor) for the third, fourth and every other younger son of the Baroness successively according to seniority during their respective lives with remainder in tail and after the death of each such younger son to his sons successively in order of seniority with remainders over. And the Baroness and the deceased in further exercise of the power in that behalf appointed that the trustees should hold the residue of the money stock funds and securities comprised in the resettlement of September 27, 1894, upon trust to raise the said sum of 7000*l.* and to pay the income of the residue of the trust funds to the Baroness during her life and subject to raising the further sums there mentioned after her decease to hold the ultimate residue for such persons and purposes and subject to such powers and provisions as would be applicable thereto if the same were the proceeds of sale of the trust estate.

The Baroness died on November 26, 1925, and estate duty was paid at the appropriate rate in respect of real estate to the value of 42,176*l.*, being the property subject to the trusts of the two resettlements.

The deceased was adjudicated a bankrupt on December 31, 1903, and died a bachelor on November 14, 1926. At the death of the Baroness, her third son, Lieutenant-Colonel the Hon. Edward Plantagenet Joseph Stourton was the person entitled to the first vested equitable estate for life in the settled property expectant on the death of the deceased and such equitable estate for life fell into possession on the death of the deceased.

On the death of the Baroness, the defendants, as trustees of the resettlements, entered into possession of the rents and profits of the settled property and until the death of the deceased, in exercise of their discretion under the resettlement of January 17, 1896, paid to him monthly the sum of 50*l.*, free of income tax, and paid the surplus to the third son.

At the death of the deceased the property, subject to the trusts of the resettlements, included stocks which were the proceeds of sale of real estate situate in the Irish Free State, to the value of 31,204*l.*

The informant claimed that these stocks, representing the proceeds of sale of real estate, passed on the death of the deceased within s. 1 of the Finance Act, 1894, or alternatively must be deemed to have so passed under s. 2, sub-s. 1 (*c*), of that Act on the ground that the disentailing deed and resettlements constituted either—(*a*) a gift by the deceased of such property of which bona fide possession and

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enjoyment was not assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise, or (*b*) a settlement by the deceased under which the property passed and whereby an interest for life was reserved to the settlor and that estate duty was payable on the death of the deceased on the principal value of the property.

The informant asked for a declaration that on the death of the deceased, estate duty at the appropriate rate became payable on the principal value of the property as passing or deemed to have passed on the death of the deceased under s. 1; or s. 2, sub-s. 1 (*c*), of the Finance Act, 1894.

Rowlatt J. decided (1.) that the disentailing deed was a disposition which took effect out of the interest of the deceased and must be deemed to have been made by him whether the concurrence of any other person was or was not required; (2.) that by virtue of s. 22, sub-s. 2 (*b*), of the Finance Act, 1894, the resettlement of January 17, 1896, was a settlement deemed to have been made by the deceased for all purposes of Part I. of that Act, including s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, which was to be treated as re-enacted in Part I. by s. 2, sub-s. 1 (*c*), of the Act of 1894; and (3.) that on the authority of *Attorney-General* v. *Heywood* (1) the discretionary trust of which the deceased was a possible object was a reservation to him of an interest within the meaning of s. 38, sub-s. 2 (*c*), of the Act of 1881 re-enacted in s. 2, sub-s. 1 (*c*), of the Act of 1894, and held that for these reasons the estate duty claimed by the Crown was payable.

The defendants appealed. The appeal was heard on July 15, 16, 17, 1930.

W. P. Spens K.C., *Raymond Needham K.C.* and *H. H. C. Graham* for the appellants. The settled property in question is not property deemed to have passed on the death of the deceased under the Finance Act, 1894, s. 2, sub-s. 1 (*c*), for it is not "property which would be required on the death

(1) 19 Q. B. D. 326.

of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by the Customs and Inland Revenue Act, 1889, if these sections were herein enacted and extended to real property as well as personal property" with the alterations mentioned in the sub-section. Sect. 38 of the Act of 1881 related to account duty, a duty intended to supplement probate duty, which was chargeable only on personal property which passed to executors by right of their office. Originally property over which the deceased had only a general power of appointment was held not to be subject to probate duty: *Platt* v. *Routh.* (1) But by 23 Vict. c. 15 probate duty was made payable on property of which the deceased had a general power of appointment by will, but it has never been payable in respect of property over which the deceased had a general power of appointment by deed only. The object of the Customs and Inland Revenue Act, 1881, was to make liable to account duty personal property that would have been liable to probate duty if the deceased had not given it away in his lifetime. It must follow that account duty was never payable on property over which the deceased had only a power of appointment by deed. Consequently it is also not liable to estate duty under the Finance Act, 1894, s. 2, sub-s. 1 (*c*), which only makes real and personal property chargeable to estate duty in the same circumstances that personal property would have been chargeable to account duty, except that it need no longer have been settled voluntarily: *Attorney-General* v. *De Préville.* (2) It follows that the Crown's claim in this case to charge the whole settled estate to estate duty on the deceased's death under s. 2, sub-s. 1 (*c*), must fail.

If, however, the Court does not accept this argument, it becomes necessary to see whether s. 38, sub-s. 2 (*c*), of the Act of 1881, as amended and re-enacted, applies. Sub-s. 2 (*c*) includes in the property chargeable "any property passing under any past or future settlement . . . . made by any person . . . . by deed or any other instrument not taking effect as a will, whereby an interest in such property, or the proceeds of sale thereof, for life or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor. . . . ." Here the disentailing deed which reserved the joint power of appointment was made by the deceased with the consent of his mother and the trusts were created under that joint power and another joint power reserved in the first resettlement. In these circumstances it is contended that the settlement effected was not the deceased's settlement. It is sought to meet this argument by relying on s. 22, sub-s. 2 (*b*), of the Act of 1894, but it is submitted that it does not apply. A disentailing deed requiring the consent of the tenant for life is not "a disposition taking effect out of the interest of the deceased person." Further, there is a great difference between a disposition made under a joint power of appointment and a disposition made by a deceased person "with the concurrence of" another person.

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(1) (1840) 6 M. & W. 756 (on reference from Rolls court); 3 Beav. 257; affirmed sub nom. *Drake* v. *Attorney-General* (1843) 10 Cl. & F. 257.

(2) [1900] 1 Q. B. 223, 232.

Lastly, the deceased did not reserve to himself any interest, and for this reason also s. 38, sub-s. 2 (*c*), as amended and enacted in the Act of 1894, does not apply. The deceased was merely a possible object of a discretionary trust and had no interest under the resettlement, and his brother was entitled during the lifetime of the deceased to all the income not applied under the discretionary trust.

[LORD HANWORTH M.R. The brother's interest was precarious, and on the death of the deceased he became tenant for life in possession.]

The Court has to see what passed at the death. In fact the deceased's brother Edward was already in possession of the settled estate, as he had a right to be under the provisions of the resettlement, subject only to the payment of 50*l*. monthly to the deceased. It is true that the discretionary trust could have been exercised so as to leave nothing for Edward, but he had a vested right to receive all that was not distributed under the discretionary trust. At the most estate duty is payable under s. 2, sub-s. 1 (*b*), on the interest which actually fell in—namely, 50*l*. a month—

but there is no right to charge the whole of the property in question with duty under s. 2, sub-s. 1 (*c*): see as to the effect of a discretionary trust *In re Coleman.* (1) In a case arising under s. 2, sub-s. 1 (*a*), it was decided that the interest retained must be retained under an enforceable arrangement in order that duty should be payable: *Attorney-General* v. *Seccombe.* (2) The contrary was decided under s. 2, sub-s. 1 (*c*), in *Attorney-General* v. *Heywood.* (3) It is submitted that the latter decision is wrong. Further the present case is distinguishable, because here the brother Edward was given an interest during the deceased's life, subject to the discretionary trust. This is not so in *Attorney-General* v. *Heywood* (3), and there was clearly a new interest arising on the settlor's death.

J. H. Stamp (*Sir William Jowitt A.-G.* with him) for the Crown. It is said that the resettlement is not a disposition of the deceased. The disentailing deeds and the two resettlements together make up the disposition. It is true that the tenant for life and tenant in tail together disentailed and resettled, but under the resettlement the tenant for life received back her life interest, so that the only disposition was out of the interest of the tenant in tail, which he was able to convert into a fee simple by the consent of the tenant for life. Sect. 22, sub-s. 2 (*b*), makes it clear that notwithstanding the need for the concurrence of the tenant for life it was the deceased's disposition. Light is thrown on s. 22, sub-s. 2 (*b*), by a decision under the Succession Duty Act, 1853, s. 2, which defines a succession and states that "the term 'predecessor' shall denote the settlor, disponer . . . . or other person from whom the interest of the successor is or shall be derived." In *Charlton* v. *Attorney-General* (4) it was decided that where a settlement was made under a joint power of appointment it was the person out of whose estate a benefit or succession was derived that was the predecessor. That applies in principle to the present case, and the effect of that decision was embodied in the Finance Act, 1894, s. 22, sub-s. 2 (*b*).

(1) (1888) 39 Ch. D. 443.
(2) [1911] 2 K. B. 688.
(3) 19 Q. B. D. 326.
(4) (1879) 4 App. Cas. 427.

Again, it is said that s. 38, sub-s. 2 (*c*), does not apply, and reliance is placed on *Attorney-General* v. *De Préville* (1); but all that this case really decides is that the property given away must be property which would otherwise have been included in an account. But when s. 38, sub-s. 2 (*c*), is re-enacted in the Finance Act, 1894, there is a complete novation of the subject-matter. Under the Finance Act the settled property now being considered would have been liable to estate duty as passing on the death but for the appointment, and that being so it is necessarily property to which s. 38, sub-s. 2 (*c*), as re-enacted for the purpose of estate duty applies.

Lastly, *Attorney-General* v. *Heywood* (2) is direct authority that the retention of an interest under a discretionary trust is sufficient to make s. 38, sub-s. 2 (*c*), of the Act of 1881 applicable. *Attorney-General* v. *Seccombe* (3) is an entirely different case, where the settlor enjoyed a benefit merely at the goodwill of the owner.

[LORD HANWORTH M.R. Mr. Spens has said that *Attorney-General* v. *Heywood* (2) is wrong. If it is right, we think it clearly applies here.]

The decision in *Attorney-General* v. *Heywood* (2) does not stand alone. It receives support from *Drummond* v. *Collins* (4), where it was decided that sums remitted from abroad by trustees under a discretionary trust to make provision for maintenance of infants were moneys received in respect of foreign possessions so as to be assessable to income tax under Case 5. The finding that the trust property was a foreign possession within Case 5 involves really a finding that each infant had an interest in the property.

[GREER L.J. Lord Parker only said that the children had an interest when the trustees had exercised their discretion.]

Can it be said in a case like the present, where trustees hold property upon a discretionary trust to apply the income for the benefit of a man and his family, that the man has not an equitable right of property in the trust fund? The trustees could not make away with the fund without the beneficiaries under the discretionary trust having a right to intervene and stop it. It follows that both on authority and on principle the deceased must be held to have retained an interest in the trust property.

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(1) [1900] 1 Q. B. 223.
(2) 19 Q. B. D. 326.
(3) (1911) 2 K. B. 688.
(4) [1915] A. C. 1011.

Spens K.C. replied.

LORD HANWORTH M.R. This appeal fails. It involves an intricate point arising upon those difficult statutes which are known as The Death Duties Acts; that is to say, the Finance Act, 1894, and the Acts incorporated with it.

It is unnecessary to state the facts in any great detail, as the case has already been reported (1); but I will summarize them for the purpose of making my judgment intelligible. [His Lordship then stated the facts shortly.] Upon the death of the deceased estate duty is claimed on the whole of the stocks representing the proceeds of sale of land in Ireland by the Crown, but what is said against the Crown is that although they may have a right to duty in respect of such interest as fell in upon his death—namely, his life interest, such as it was—the whole property was not to be subjected to estate duty, because the only interest that the deceased had and which fell in upon his death was the precarious interest which had been reserved to him and which had been implemented by the payment to him by the trustees in their absolute discretion of the sum of 50*l*. a month.

In order to determine whether or not estate duty is payable on the whole estate as passing upon the death of the deceased, we have to look at these intricate statutes. By s. 1 of the Finance Act, 1894, estate duty is made payable in the case of every person dying after the commencement of the Act "upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passed on the death of such person." That is the primary charge which makes estate duty payable: it is payable on all property, real or personal, settled or not settled, which

(1) [1930] 1 K. B. 539.

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passes on the death. But s. 2 brings into the purview of s. 1 a great deal more property than would appear at first sight to be charged under s. 1. Sect. 2, sub-s. 1, says this: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say." Then follow four clauses, and clause (*b*) is the one which the appellants would like to say is applicable. It is: "Property in which a deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." The Crown on the other hand say that the property is embraced within s. 2, sub-s. 1 (*c*), and thus falls within the charge under s. 1. Sect. 2, sub-s. 1 (*c*), makes the duty payable on "property which would be required on the death of a deceased person to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

It is quite plain that there could hardly be a worse illustration, or perhaps I ought to say, a better illustration of confused legislation. We are to take a subsidiary clause of s. 2, as enlarging the application of s. 1, and to ascertain the further property to which it is made applicable we have to go back to a statute of 1881, which originally applied only to personal property, treat it, as amended by a statute of 1889, as extended to cover real property, and strike out from the section the words "voluntary," "voluntarily," and "volunteer" wherever they happen to be. It is by resort to the new section so constructed with the help of the section of the Act of 1881, as amended by s. 11 of a statute of 1889, that we are to determine the riddle to be solved in the present case. It is abundantly plain that a number of intricate questions must arise, and hard indeed is the task of those who have to advise the subject as to his liability in such circumstances.

However, it is, I think, plain that we have to read the Customs and Inland Revenue Act, 1881, as amended, as having now been extended to real property as well as to personal property, and I do not think that we are really justified in applying a careful criticism to it as if it still applied only to personal property. Much of the interesting argument addressed to us by Mr. Spens was to the effect that regard ought to be had to the original purpose of this statute, and that unless it could be shown that the property which is now under consideration fell within it, the section as amended could not be treated as making it chargeable to estate duty.

I think, however, that the Court has, as well as may be, to try to fit real property into a statute which deals with personal property only, and for that purpose I think that guidance is to be found from a matter to which our attention has been called by Mr. Stamp.

In the Succession Duty Act, 1853, s. 2, there is a definition of the dispositions and devolutions of property that confer successions so as to make the subject chargeable to succession duty in respect of that succession; and in *Charlton* v. *Attorney-General* (1), a case to which he called our attention, it was decided that the predecessor was the person out of whose property the disposition is made. In that particular case the succession was treated as derived from a deceased tenant in tail, who had joined with his father the tenant for life in disentailing and resettling the property so as to confer on the father and a brother a power of appointment under which they dealt with the property. Upon the father's death the appointment took effect, and it was held that the persons taking the succession under the appointment took it as a succession from the tenant in tail, who had the power to dispose of the property to which they succeeded. Applying that rule one has got to find who was the person who had the power of disposition of the estate in this case.

Passing from that section in the Succession Duty Act, I desire to call attention to s. 22 of the Finance Act, 1894, which in sub-s. 2 provides: " (*a*) A person shall be deemed

(1) 4 App. Cas. 427.

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competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail whether in possession or not; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exerciseable by instrument inter vivos or by will, or both, but exclusive of any power exerciseable in a fiduciary capacity under a disposition not made by himself, or exerciseable as tenant for life under the Settled Land Act, 1882, or as mortgagee; (*b*) a disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required."

Now what is the disposition of this estate? To answer that question I think we have to take the disentailing deed and the two resettlements together. If one was considering the matter from the point of view of the two deeds executed on September 27, 1894, without taking into account the 1896 resettlement, it would be abundantly plain that their purpose and effect must be taken together, because they were two deeds for the purpose of effecting or carrying into effect a purpose which had been fully specified before either of them was executed. The deed of 1894 failed of its purpose because the deceased got into greater financial difficulties, and thus it was that the resettlement of January 17, 1896, came to be executed; but it was executed in pursuance of the joint power of appointment that had been reserved and in consequence of the freedom which the disentailing deed gave to the persons in whom the joint power of appointment rested. For the purpose then of ascertaining the substance of the matter, I look at the three deeds, or perhaps it may be better to say that I look at the disentailing deed and the deed of 1896 only. Who was the person who had something to dispose of to which there could be a succession by the present tenant for life Edward? It was not his mother the Baroness, for she had an estate as tenant for life and no more. It was then the brother Alfred (the deceased), who was tenant in tail in remainder, and who had something of which he could dispose. Therefore he comes within the definition which I have read in sub-s. 2 of s. 22, and the disposition that was made is none the less a disposition by him alone, although it was made with the concurrence of the Baroness, who as tenant for life joined in the resettlement made. Therefore a disposition was made, and it was made by the deceased alone, because he was the only person who had property in the estate in respect of which it was possible to make a disposition beyond his own life. He could reserve a life estate to himself and dispose of the remaining interest in the property ultra. That it appears to me he did.

To this extent then the terms of the statute are satisfied, and I turn back to consider whether or not the last portion has been fulfilled, that is, to ascertain whether or not what has happened falls within s. 38 of the Customs and Inland Revenue Act, 1881. Sect. 38, sub-s. 2, provides: "The personal or movable property to be included in an account shall be property of the following description, viz.: . . . . (*c*) any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

Mr. Spens says, and with force, that although the purposes necessary to bring the case within the statute may so far have been fulfilled that there was a disposition by the deceased, yet there was no interest reserved, either expressly or by implication, to the deceased as settlor. All that was reserved to him was a chance of receiving a sum from the trustees, if they should in their discretion think fit to give him something; and more than that, the trust was not simply a discretionary trust for the benefit of a class, but there was an express provision as regards any surplus remaining after the class had or had not been paid any part of the rents and profits, that the surplus was to be paid or applied to the persons or for the purposes to and upon which the net rents and profits of the trust estate would be payable or applicable if the deceased were dead, that is to the brother Edward. Therefore we have the case of a discretionary trust for the benefit of a class, with a trust over, and it is not a case where an application could be made to the Court to enforce the trust in favour of the class, because though a discretionary trust, the discretion had to be exercised in favour of some or one of the persons included in that class and nobody else.

We have, therefore, to consider what is the meaning of the word "interest," in s. 38, sub-s. 2 (*c*), of the Act of 1881. Does the chance that the deceased had of receiving some money before the trustees paid over the surplus rents and profits to his brother Edward constitute an interest within the meaning of s. 38, sub-s. 2 (*c*)? I confess the matter is one by no means free from difficulty and doubt, but in *Attorney-General* v. *Heywood* (1), which was decided forty-three years ago by two distinguished judges, Stephen and Wills JJ., it was held that where in a settlement a discretionary trust was given to trustees to apply income for the benefit of the settlor, his wife, any future wife and any children, an interest was taken by the settlor which was sufficient to bring the case within this sub-s. 2 (*c*). That case, of course, is not binding upon this Court. An attempt was made by Mr. Spens to distinguish it by saying that there was a much larger class indicated in the present case than in that case when the trust was for the benefit of the settlor, his present wife or any future wife and his children. It was said that this was a narrow trust for the family, or one or other of them, whereas in the present case there was a more numerous class indicated with the trust over. I am not prepared to accept an interpretation of the word "interest" which would vary according to the number of persons who are indicated in a discretionary trust. It cannot be merely a question of degree. One has

(1) 19 Q. B. D. 326.

got to put a definite interpretation on the word "interest" irrespective of whether or not the discretionary trust is given in favour of a larger or a smaller class. I therefore am unable to accept the suggested distinction which Mr. Spens has put before us with regard to *Heywood's* case. (1) Again I am unwilling to indicate dissent from, still less to overrule, a case which has stood now for so long a period of time, and must have taken its place as a guide in a great number of cases, and been acted upon as an integral part of the interpretation to be placed upon this system of statutes.

That case has decided, in such a case as the present, that an interest within the meaning of this very section is reserved to the settlor. I think some sort of support for that view is given in the case to which Mr. Stamp referred of *Drummond* v. *Collins*. (2) There the question for decision was whether the persons who were interested in the receipt of moneys from property outside the United Kingdom, in sums which were paid to them at the discretion of trustees, were liable to income tax upon those moneys as holding a possession. If all that was determined was that the money when it was received over here and lay in the bank was subjected to taxation, there was no need whatever to apply the provision in Case 5 as to foreign possessions. But in fact, although there are doubtful passages in the speeches of the learned Lords, I think that the intention of the House was to affirm the decision of the Court of Appeal (3), that there was a foreign possession. That decision of the Court of Appeal is the more interesting, because there was a divergence of opinion between Cozens-Hardy M.R. and Joyce J., and I think that the view presented by Mr. Spens was that presented by Joyce J. The Master of the Rolls did not agree with it, and he held that there was a foreign possession, which those persons held, and that was accepted by the House of Lords, although under clause 22 of the will the testator expressed an intention that these beneficiaries should have no interest in the foreign possession or the income thereof until instalments of income were actually received.

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(1) 19 Q. B. D. 326.

(2) [1915] A. C. 1011.

(3) [1914] 2 K. B. 643.

However, even without the support which can be gathered from *Drummond* v. *Collins* (1), I think it is too late for us to reopen the question which was decided in *Attorney-General* v. *Heywood* (2); and I think that for the purposes of the interpretation of s. 38, sub-s. 2 (*c*), it must be held that where there is a discretionary trust, a possible object of that trust holds an interest within sub-s. 2 (*c*). That being so, the 1896 resettlement, to which I have already referred, did give an interest to the deceased and therefore amounted to a reservation, either express or implied, to the settlor of an interest in the property of which by the disposition he was the disponer.

I come therefore to the conclusion that the facts of this case bring the property within the charge, as the Crown alleges, and therefore that the information of the Attorney-General is well founded, and that Rowlatt J. was right in giving judgment for the Crown. The appeal will therefore be dismissed with costs.

Greer L.J. I have come to the same conclusion, not without having met serious difficulties on my way to that conclusion. The Crown, through the Attorney-General, claim by reason of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, to be entitled to estate duty on what I will call, for convenience, the Corbally estate, when on the death of Major Alfred Stourton it became vested in possession in his brother Edward Stourton.

The difficulty in this case arises from the way in which the section has been drafted; it applies both to real property and personal property the sections of earlier Acts which only have reference to personal property. Rowlatt J. decided the case in favour of the Crown. The appellant says he was wrong for three reasons: he says that the exercise of a power of appointment which can only be exercised by deed does not bring the property in respect of which the power is exercised within the provisions of s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, when incorporated in s. 2, sub-s. 1 (*c*), of the Act of 1894. That is a formidable argument, and is supported by some observations made in the case of *Attorney-General* v. *De Préville* (1), especially in the judgment of Vaughan Williams L.J. But I have come to the conclusion that when the section of the Act of 1881 comes to be incorporated in an Act which deals not merely with personal property, as the Act of 1881 did, but also with real property, it enables you to give to that section when so incorporated a meaning different to that of the section as it stood alone in the earlier Act, and I cannot help thinking that the real reason for the decision in *Attorney-General* v. *De Préville* (1) is to be found in the passage of Vaughan Williams L.J.'s judgment (2), where he says: "Surely, according to the ordinary rules of construction, the word 'property' in the statute of 1881 must be limited to property in its nature capable of devolution as part of the estate and effects of a deceased."

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(1) [1915] A. C. 1011.

(2) 19 Q. B. D. 326.

The Corbally estate was when the disentailing deed and the subsequent resettlements were executed property capable of devolution as part of the estate of a deceased, but the property dealt with in *Attorney-General* v. *De Préville* (1) was a life estate which, even if it had not been released, would not have been capable of devolution as part of the tenant for life's estate. For these reasons I think that the first argument fails, though I was at one time greatly impressed by the lucid and vigorous way in which it was presented by Mr. Spens.

The second argument put forward is that the Court cannot treat Major Alfred Stourton, the deceased, as the person who disposed of the property in question by the various deeds that have been referred to, because he disposed of them not by himself, but in conjunction with the Baroness, who was the life tenant and the protector of the settlement. I think Mr. Stamp, on behalf of the Crown, gave the true answer to that argument, relying on *Charlton* v. *Attorney-General* (3),

(1) [1900] 1 Q. B. 223.

(2) [1900] 1 Q. B. 232.

(3) 4 App. Cas. 427.

and the earlier cases which were then affirmed by the House of Lords. It was there decided that where two persons are interested in an estate, one for life and the other in remainder, and they wish to make dispositions not intended to come into operation until the remainder would have vested in possession, the disponer of those rights is the remainderman and not the person who had prior rights, or who was merely concurring, because his or her concurrence was necessary. I therefore think that the provision in s. 22, sub-s. 2 (*b*), of the Finance Act, 1894, that " a disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required," has the effect in this case that the disposition in question must be deemed to have been made by the deceased, Major Alfred Stourton. That is, in my view, a sufficient answer to the second argument in support of this appeal.

The third argument in support of this appeal is one which, but for an authority which has been cited, would have presented great difficulty. It was argued that the position of the deceased during the ten months that he was alive after the death of the Baroness was that of a person who had no interest in the Corbally estate, but might receive a gift from the trustees of the estate, because he was only interested under a discretionary trust which might or might not be exercised in his favour, and was, I think, exercised in his favour to the extent only of 50*l*. a month. It was a trust which did not confer on him any legal right whatever, except I suppose the possible right to ascertain from the trustees how they were exercising their discretion ; and but for the authority of *Heywood's* case (1) I should have felt considerable difficulty in holding that he had any interest in the Corbally estate.

However, I cannot distinguish in any material fact the question, as it arises in this case, from the question that arose in *Attorney-General* v. *Heywood* (1), a case decided in 1887 in the Queen's Bench Division. In that case the only interest which the settlor retained in the sum of money settled by him was the expectation, well founded or ill founded, that the trustees would exercise their discretion in his favour; but the trustees might quite lawfully have refused to give him anything, and have distributed the income among his wife and children. He had a mere expectation that the discretion which was vested in the trustees might be exercised in his favour, either partly or entirely, and that in my judgment is exactly the position that Major Alfred Stourton was in in this case. He had no legal right to force the trustees to give him anything; at the same time he had in a colloquial sense an interest in the estate, because it was an estate out of which something might be allotted to him in the discretion of the trustees. Whether that is an interest within the meaning of the Act of 1881 has, I think, been determined by *Attorney-General* v. *Heywood* (1), and the decision has stood since the year 1887, a period of forty-three years. It is not believable that during that period of time questions have not arisen in the practice of conveyancers and between persons from whom estate duty has been claimed and the Crown that have not been conclusively settled by that authority. I do not think therefore that it is possible after all these years for the Court to entertain the notion that it is a case liable to be reversed on appeal.

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(1) 19 Q. B. D. 326.

I have only one other observation to add. In my judgment, for the reasons which I have indicated during the course of the argument, the case of *Drummond* v. *Collins* (2) has no relevance to any of the questions that have to be decided in this appeal.

I agree that this appeal should be dismissed with costs.

ROMER L.J. The first question arising on this appeal is as to the meaning of the word " property " in s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. That question was considered by this Court in *Attorney-General* v. *De Préville* (3), and in the course of giving his judgment in that case A. L. Smith L.J.

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(1) 19 Q. B. D. 326.
(2) [1915] A. C. 1011.
(3) [1900] 1 Q. B. 223.

put to himself this question in connection with the sub-section: "Is its true reading that, if there be property which would come into an account upon death if it had not been given away, that property must be brought into an account if the deceased has given it away less than 12 months before death?" and having put that question to himself, as I read his judgment, he answered it in the affirmative, because he said a little later on, "It"—that is the property under the section—"is only to be brought into an account if it would have had to be so brought but for the gift." But, of course, the question arises, brought into what account? It has been argued before us that the account is that which would have had to be rendered under the Act of 1881, had the real estate with which the Court has to deal been personal estate. So to hold, however, would not be to give effect to the words of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, which not only require that the section of the Customs and Inland Revenue Act, 1881, as amended by the Customs and Inland Revenue Act, 1889, should be read as though they were extended to real property, but that they are to be read as though they were enacted in the Finance Act, 1894. In my opinion the learned Lord Justice meant an account that would be rendered under the Finance Act, 1894, for the purposes of estate duty, and the decision in that case was, that property within the meaning of s. 2, sub-s. 1 (*c*), is such property as, but for one of the dispositions mentioned in s. 38 of the Customs and Inland Revenue Act, would be brought into an account for estate duty under the Finance Act, 1894.

Before the execution of the three deeds in question in this case the deceased was possessed of an estate tail and, had those three deeds never been executed, on his death the property in which he had that estate tail would have had to be brought into account for the purposes of estate duty. That would be by virtue of s. 2, sub-s. 1 (*a*), of the Finance Act, 1894, as explained by s. 22, sub-s. 2 (*a*), of that Act. Therefore, before the execution of any of those deeds, the deceased was, in my opinion, possessed of property within the meaning of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894.

The next question is, did he effect a settlement of that property? In my opinion he obviously did. He settled his estate tail in the only way in which an estate tail can be settled, that is, by means of a disentailing deed, coupled with a subsequent resettlement of the property. It is true that his mother joined in the resettlement, so that it was not a settlement by him alone, but none the less it was a settlement by him, and, indeed, he was the person who brought into settlement the only property on which the settlement was capable of operating after the death of the mother. I therefore come to the conclusion that these three documents constituted a settlement of property by the deceased within the meaning of s. 2, sub-s. 1 (*c*), or, rather, I should say, within the meaning of s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881.

Then the only question remaining to be decided is whether under that settlement an interest was reserved to the deceased for his life or for some other period determinable by reference to death expressly or by implication. Again, that question has been considered by the Court—not by this Court, indeed, but by a Divisional Court—in *Attorney-General* v. *Heywood*. (1) It is true that in that case there was a trust for accumulation of the income of the property so far as it was not applied under the discretionary trust given to the trustees, and those accumulations were held, pending the duration of the discretionary trust, for the benefit of those who ultimately were to become entitled to the property from which the income accumulated. In the present case there is an immediate trust, for those who would be entitled to the property after the death of the deceased, of the income so far as not applied by the trustees under the discretionary trust. In my opinion there is no real difference between the two cases; and it was decided in *Attorney-General* v. *Heywood* (1) that the prospect of an object of a discretionary trust sharing in the income, the subject-matter of the discretionary trust, is an interest of that person in the property from which the income is derived. That was decided by *Attorney-General* v.

(1) 19 Q. B. D. 326.

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Heywood (1), and in my opinion it was rightly so decided. Further, so far as I am concerned, I think it is reasonably clear from the report of *Drummond* v. *Collins* (2) that both Lord Parker and Lord Wrenbury regarded such a prospect of sharing in a discretionary trust as an interest in the property from which the income, the subject-matter of the discretionary trust, was derived.

For these reasons I agree that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Gustavus Thompson & Sons, for W. Roche & Sons, Dublin; Solicitor of Inland Revenue.*

H. C. G.

In re CARROLL.

C. A.
1930
Oct. 14.

Habeas corpus—Application for Writ—Jurisdiction of Court of Appeal to hear original Application—Court of Appeal not Part of High Court of Justice.

The Court of Appeal is not a part of the High Court of Justice, and has no original jurisdiction to entertain an application for the issue of a writ of habeas corpus.

Ex parte Le Gros [1914] W. N. 31; 30 Times L. R. 249 applied.

Where an appeal is brought to the Court of Appeal the mere fact that the subject-matter is habeas corpus does not, in a proper case, preclude the making of an order requiring the appellant to give security for costs.

MOTION by the respondents for an order that the appellant be ordered to give security for costs.

Ellen Carroll (hereinafter called "the appellant") applied to the Divisional Court, after having unsuccessfully applied to Charles J. in chambers, for leave to issue a writ of habeas corpus directed to the respondents, the Homeless Children's Aid and Adoption Society and F. B. Meyer's Children's Home (Incorporated), to bring up the body of her infant daughter, Joan Margaret Carroll. The Divisional Court refused to order the issue of the writ. The respondents' costs in the proceedings had been taxed but were not paid. Ellen Carroll gave notice to the respondents that the Court of Appeal would be moved to reverse the order of the Divisional Court, and would be moved to order the issue of the writ of habeas corpus and that the costs of the appeal and the costs of the proceedings before Charles J. and the Divisional Court be paid by the respondents.

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(1) 19 Q. B. D. 326.

(2) [1915] A. C. 1011.

Sir Thomas Inskip K.C. and *E. G. Palmer* for the respondents asked for an order for security for costs.

Sullivan K.C. and *Seuffert* for the appellant. This application is misconceived. The very nature of the writ of habeas corpus, which has been favoured by the law throughout the whole of its history, negatives the suggestion that any obstruction should be put in the path of a person who applies for the writ. There is no precedent for such an order being made. While in form the appellant is appealing, she in reality comes, as she is entitled to do, to this Court by way of original motion. In habeas corpus there is no litigation between the parties, and an applicant for the writ can go from Court to Court: per Lord Halsbury L.C. in *Cox* v. *Hakes* (1), and that right was reaffirmed by the Privy Council in *Eshugbayi Eleko* v. *Nigerian Government Officer.* (2)

[SCRUTTON L.J. In *Ex parte Le Gros* (3) the Court of Appeal expressed the view that it had no original jurisdiction to order the issue of the writ of habeas corpus.]

In that case the only decision was that the subject-matter of the appeal being a criminal cause or matter no appeal lay. This is not a criminal cause or matter.

[*Ex parte Alice Woodhall* (4) and *Barnardo* v. *McHugh* (5) were also referred to.]

Sir Thomas Inskip K.C. in reply. The applicant for the writ has chosen to appeal to this Court. The rule nisi was directed to my clients, who had therefore a right to appear. Having been served with a notice of appeal which asks (inter

(1) (1890) 15 App. Cas. 506, 514.

(2) [1928] A. C. 459.

(3) [1914] W. N. 31; 30 Times L. R. 249.

(4) (1888) 20 Q. B. D. 832.

(5) [1891] A. C. 388.

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alia) that they may be ordered to pay the costs in the Court below and this Court, they are entitled to apply for an order upon the appellant requiring her to give security for the costs in view of the fact that she is obviously an impecunious person.

SCRUTTON L.J. This is an application for security for costs made by those who have been served with a notice of appeal by the appellant asking that they should pay the costs of the appeal. The appellant, Ellen Carroll, is, it is clear, an impecunious person, although, in spite of that, she has contrived to appear by King's Counsel. The answer on her behalf to the application for security is in substance this: she is applying for a writ of habeas corpus for her child, and that fact, either absolutely, or as a matter of discretion, prevents the Court ordering security for costs. The writ of habeas corpus is viewed with the greatest favour by the Courts. Quite recently in *Eshugbayi Eleko* v. *Nigerian Government Officer* (1) the Privy Council made an exhaustive examination of the writ of habeas corpus in the High Court. In the course of his judgment Lord Hailsham L.C. said (2): "If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that, although by the Judicature Act the Courts have been combined in the one High Court of Justice, each judge of that Court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application. The same principle must apply in the case of the judges of the Supreme Court of Nigeria." Now, it is suggested, following from the view there expressed as to the power to make repeated applications for the writ of habeas corpus, that what is really pending is not an appeal

(1) [1928] A. C. 459.

(2) [1928] A. C. 468.

from the Divisional Court but is an application to the Court of Appeal under its original jurisdiction, and that being so, no order for security can be made. Whether that contention is right or not depends upon the question whether the Court of Appeal is a member of the High Court of Justice. The answer to that question is to be found in the Judicature Act, which says that the Court of Appeal is not a member of the High Court. The Supreme Court of Judicature is composed of the High Court and the Court of Appeal, and the members of the Court of Appeal can only sit as judges of the High Court when certain formalities have been complied with which have not been complied with in this case. We are not members of the High Court to the judges of which repeated applications for the issue of a writ of habeas corpus can be made. Apart from that consideration, the point has been before this Court and been decided so as to be binding upon us. In *Ex parte Le Gros* (1) an application was made to the Court of Appeal for a rule nisi for a writ of habeas corpus directed to the Governor of Brixton Prison to which the applicant Le Gros had been committed with a view to his extradition. A previous application had been made to the Divisional Court and had been refused. The first answer to that application was that it was in a criminal cause or matter and therefore no appeal lay. But counsel there contended that he did not apply by way of appeal but invoked the original jurisdiction of the Court of Appeal to hear the application, as he was entitled, according to *Cox* v. *Hakes* (2), to go from judge to judge. The Court considered the matter and adjourned the hearing to enable counsel to look into the question whether the Court of Appeal had original jurisdiction in habeas corpus. Counsel later said that he could find no case which said that the Court of Appeal had original jurisdiction in habeas corpus, whereupon Phillimore L.J. said (3) "that the Court of Appeal was a statutory Court created by the Judicature Act, 1873, and could only do such things as that statute expressly allowed."

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(1) [1914] W. N. 31; 30 Times L. R. 249.

(2) 15 App. Cas. 506.

(3) 30 Times L. R. 250.

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Neither counsel nor the members of the Court could find any original jurisdiction in habeas corpus in the Court of Appeal as distinct from judges of the High Court of Justice. Counsel then made a further effort on behalf of his client by saying that the Lord Chief Justice, who was then sitting in the Court of Appeal, was a member of the High Court, and accordingly counsel applied to the Lord Chief Justice to grant the writ. To that the Lord Chief Justice replied that he was there as a member of the Court of Appeal and could not, as one of the three appellate judges, take the application. That case binds us to say that the Court of Appeal has no original jurisdiction in habeas corpus, and that it is not a member of the High Court of Justice.

In those circumstances the matter can only be dealt with by us by way of appeal from the Divisional Court. That being so, is there anything to exclude the jurisdiction of the Court of Appeal to require security for costs from an insolvent appellant when that insolvent appellant is applying for habeas corpus ? On the question of ordering security for costs I desire to say this : the mere fact that a person is in poor circumstances does not justify security being ordered where that person is making his first effort to obtain a decision. A perfectly impecunious person may commence proceedings by the issue of a writ which may involve the defendant in a large sum for costs because the plaintiff, who, I will assume, is unsuccessful, has no funds. As I have sometimes expressed it, the Courts allow an impecunious person to get one bite of the cherry but will not allow him a second bite unless he, as appellant, is able to provide security for the costs of the appeal. That rule of stopping an impecunious appellant, who has had a decision against him, unless he can give security for costs, has been mitigated in recent years by the Poor Persons' Rules by which a poor person on satisfying a certain body that he is impecunious but has a reasonable ground of success in an action, is allowed to proceed and is relieved from a number of costs. In the present case Ellen Carroll is an impecunious person and will obviously be unable to pay costs if her appeal fails. Yet she appears by a King's Counsel. This seems to me peculiarly a case where the Court, considering that the appellant has had two decisions against her, should say that if she desires to obtain another decision it will protect the respondents by ordering her to give security for the costs of the appeal. The fact that the appeal relates to an application for habeas corpus is of itself no ground for preventing the Court ordering security. There will be an order for security to the amount of 35*l.*

LAWRENCE and GREER L.JJ. concurred.

Order for security.

Solicitors for appellant: *Ellis & Willes and Ingpen & Armitage.*

Solicitors for respondents: *Carter & Bell.*

J. S. H.

MORSE *v.* OUSE DRAINAGE BOARD.

1930
Feb. 10.

[1929. M. 2306.]

Rates—Sewers Rates—Land Drainage—Drainage Board—Assessment to Rate of Owner of Land within Limits of Area administered by Board—Refusal of Owner to pay Rate—Enforcement of Rate—Distress—Whether Goods and Chattels outside the Area administered by the Board can be distrained —Statute of Sewers, 1531 (23 *Hen.* 8, *c.* 5), *s.* 3—*Sewers Act,* 1849 (12 *&* 13 *Vict. c.* 50), *s.* 7—*Land Drainage Act,* 1861 (24 *&* 25 *Vict. c.* 133), *s.* 67 —*Land Drainage Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 17), *s.* 1—*Land Drainage (Ouse) Provisional Order Confirmation Act,* 1920 (10 *&* 11 *Geo.* 5, *c. cxxii.*), *s.* 1.

Payment of a sewers rate, duly made by a Drainage Board constituted under the Land Drainage Acts, 1861 and 1918, may be enforced by distress on the goods and chattels of a party liable to the rate, even though such goods are not within the limits of the area administered by the Board.

ACTION tried before MacKinnon J.

The plaintiff, Gilbert Morse, was the owner of certain property in the parish of Brandon, in the county of Suffolk, comprising a dwelling-house, four cottages and about 150 acres of land. About 50 acres were within the limits of the area administered by the defendants, the Ouse Drainage Board, and the remainder of the property including the four cottages and the dwelling-house were outside the limits of that area.

On or about April 30, 1929, the plaintiff was summoned before the defendants to show cause why he should not pay the sum of 17*l.* 7*s.* 4*d.* alleged to be due by him to the defendants in respect of drainage rates on the 50 acres.

The plaintiff duly appeared before the defendants and showed cause why he should not pay the said sum, but the defendants rejected his contentions, and the plaintiff alleged that the defendants unlawfully threatened to levy the said sum by distress upon the plaintiff's goods in or about the said dwelling-house, notwithstanding that the goods were outside the limits of the area administered by the defendants.

On August 6, 1929, the Court granted an injunction until the trial of the action restraining the defendants from levying a distress upon the plaintiff's goods outside the limits of the area administered by the defendants in respect of drainage rates upon payment into Court by the plaintiff of the sum of 17*l.* 7*s.* 4*d.*

The plaintiff claimed: (1.) declaration that the defendants had no power to levy a distress upon the plaintiff's goods outside the limits of the area administered by the defendants; and (2.) an injunction to restrain the defendants, their servants and agents from levying a distress upon the plaintiff's goods outside the limits of the area administered by the defendants in respect of drainage rates.

The defendants by their defence denied that they had unlawfully threatened to levy the said sum by distress upon the plaintiff's goods in or about the said dwelling-house, notwithstanding that the goods were outside the limits of the area administered by the defendants.

The defendants further said that they were a statutory body constituted by the Land Drainage (Ouse) Provisional Order Confirmation Act, 1920 (10 & 11 Geo. 5, c. cxxii.), and that the acts complained of were acts done by the defendants under and by virtue of and in pursuance of the powers conferred upon them by the Statute of Sewers, 1531 (23 Hen. 8, c. 5), and in particular s. 3; the Sewers Act, 1849 (12 & 13 Vict. c. 50), and in particular s. 7; the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), and in particular s. 67; and 10 & 11 Geo. 5, c. cxxii.

van den Berg and *J. P. Gorman* for the plaintiff.

Montgomery K.C. and *Gerald Howard* for the defendants.

The arguments sufficiently appear from the judgment.

MacKinnon J. In this case the plaintiff is the owner of property at Brandon, about 150 acres, and of that property about 50 acres are within the limits of the area administered by the Ouse Drainage Board. The Ouse Drainage Board in respect of the plaintiff's ownership of those 50 acres assessed him to payment of a rate of 17*l.* 7*s.* 4*d.* The plaintiff objected to pay that sum, and, having refused to do so, was, in pursuance of certain statutory powers, summoned by the Ouse Drainage Board to appear before it and show cause why he should not pay. He did not give any satisfactory reason, and the Board thereupon issued a distress warrant to recover the sum of 17*l.* 7*s.* 4*d.* It is not disputed that their bailiff proposed to levy distress in pursuance of that warrant upon the chattels of the plaintiff outside the area administered by the Drainage Board. The plaintiff, being of opinion that that would be an illegal distress, applied to this Court for an injunction to restrain the defendants from levying a distress under that warrant. An interlocutory injunction was granted in order that the question might be tried, and the action now comes on for trial, the plaintiff claiming a declaration that the defendants have no power to levy distress upon the plaintiff's goods outside the defendants' area. That is disputed by the defendants, and therefore that is the question which I have to try.

The Ouse Drainage Board came into existence by virtue of the Land Drainage (Ouse) Provisional Order Confirmation Act of 1920, which confirmed a Provisional Order made

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under the Land Drainage Act, 1918. By reason of that Provisional Order, confirmed by the Act of 1920, the Board became a drainage board, and thereby obtained the powers of a Drainage Board pursuant to the Land Drainage Act, 1861. By virtue of s. 67 of that Act a drainage board inherits the powers of the old Commissioners of Sewers, and for that reason, in order to ascertain what are the present powers of the defendant Board, one has to go back to the Statute of Sewers, 1531, an Act passed in the twenty-third year of Henry VIII. That Act provides by s. 3 that Commissioners of Sewers (inter alia) may "tax, assess, charge, distrain, and punish, as well within the metes, limits and bounds of old time accustomed, or otherwise, or elsewhere within our realm of England"; and it also provides that they shall have power "to distrain for the arrearages of every such collection, tax, and assess, as often as shall be expedient, or otherwise to punish the debtors and detainers of the same, by fines, amerciaments, pains or other like means after your good discretions." It is perhaps not without importance to observe that it provides that they may also "take such and as many trees, ... and other necessaries, as for the same works and reparations shall be sufficient . . . . as well within the limits and bounds aforesaid, as in any other place within the said county or counties near unto the said places." The Commissioners of Sewers having been by the statute of 1531 given the power to assess people for taxes or rates and given the power to distrain in order to enforce payment of those rates, the extent of that power was subsequently discussed in two very interesting pieces of legal literature. The first to be published was a Reading upon the Statute of Sewers delivered in the Lent Term of 1638 by John Herne, Esq., of the Hon. Society of Lincoln's Inn. He expresses a very clear opinion upon the exact point which now falls to be determined in this case, for, in dealing with the question of distress, he says at p. 14: "A distress of D. in London, or in any other town, good within this law: as to the lands or goods to be taxed, they are limited to their jurisdiction. But upon a refusal of payment, a distress in any part of the realm is a lawful distress." That was in the course of the second day of his Reading; and then upon the fifth day he says at p. 29: "Lands to be charged within the decree, ought to be within the bounds of Commissioners; but there is a difference between locality for a decree, and for a distress; for the distress may be in any part of the realm"; and then he goes on to deal with people non compos mentis, and so forth. An even more celebrated Reading upon the Statute of Sewers—one of the few Readings of which some repute has survived even until to-day—is the Reading of Mr. Robert Callis, Sergeant-at-Law, which was delivered by him as an Autumn Reader in 1622, but was not published until 1647, nine years after Herne's Reading of 1638. Callis expresses upon this point the same opinion as Herne. Having pointed out that where a Court Leet or Court Baron issues a warrant of distress that must be for execution at some place within the jurisdiction of the Courts, he goes on to say this at p. 144: "But in the case of a sess, rate, or tax imposed by the Commissioners of Sewers, a distress for any of those may be taken in any place within the realm of England; for in this case the distress is merely grounded upon the statute, and is bounded by the same limits, which is as large as the realm of England; and hereupon by this construction made in this legal manner, all the words in the said clause of this statute have their full operation"; and then summing the matter up, he further says: "A distress for a rate, or sess, or tax assessed and imposed by the Commissioners of Sewers may be taken in any part or place within the realm of England; for this is a distress grounded upon the statute, and is as large as the extent thereof. And so the difference appears where the distress is guided by the commission, and where by the statute." That was followed—perhaps no authority is thereby added to the opinions expressed by those two learned authors—by Comyn's Digest, but I think that really does little more than record the opinion of Callis and rely solely upon it. For under the heading of the article "Sewers" and the sub-heading "Remedy for assessment by distress," it is laid down that a distress may be taken upon the goods of any one charged to the assessment "at any place within the Kingdom," and reference is made to the passage that I read just now from Callis's Reading.

That was the old law upon the subject, but a further statutory provision followed in the year 1849. That is the statute 12 & 13 Vict. c. 50, the title of which is: "An Act for further amending the laws relating to sewers," now known as the Sewers Act, 1849. The opening of the preamble of that Act is: "Whereas considerable inconvenience and expense are found to arise from the inefficient state of the laws relating to sewers, and it is expedient that the same should be amended." Sect. 7 of that Act provided machinery in regard to the recovery of sewers rates and fines. It provided (inter alia) that where a person duly rated and assessed in one or more sewers rates had refused to pay the same, a Commissioner might issue his summons to such person "to appear, at a time and place to be therein specified, before any two Commissioners acting within and for such limits, to show cause why such person refuses to pay the said sum or sums." It was pursuant to that part of that machinery that Mr. Morse was summoned before two members of this Board to show cause why he should not pay this sum of 17*l.* 7*s.* 4*d.* The section goes on to provide: that upon proof of the making of the rate and of the refusal of the person to pay the same "it shall be lawful for the said two or other Commissioners to issue their warrant to levy the said sum or sums, and also the costs and expenses incurred in obtaining such warrant (to be specified therein) and in executing the same, by distress and sale of the goods and chattels of such person," and the section so far as this procedure is concerned stops there. That really does not carry the matter with regard to the right to distrain on goods and chattels any further than the Act of Henry VIII., but it amplifies and defines the procedure; it is noticeable however that the words of the section are "levy the said sum . . . . by distress and sale of the goods and chattels of such person" without any limitation as to the locality where such goods or chattels may be seized. The section goes on to provide: "Provided always, that if no such distress or distresses as aforesaid can be found, the same rates or fines, costs, charges, and expenses, together with the costs and charges of raising and levying the same, shall and may be raised and levied upon and out of the lands, tenements, and hereditaments, within the limits of the Commission under and by virtue of which the distress warrant shall be issued, of or belonging to the person . . . . upon or against whom the distress warrant shall be issued. . . . ." So that when it comes to a question of levying the rate by execution upon the land of the person liable there is (and I think it is a very pertinent thing to observe) the addition that those lands shall be "within the limits of the Commission under and by virtue of which the distress warrant shall be issued."

The next Act in order of date is the Land Drainage Act, 1861, which, in the case of a considerable number of sewer commissions, provided for the creation of elected drainage boards and transferred to those drainage boards the old powers of the Commissioners of Sewers. Sect. 66 provides for the incorporation of drainage boards, and s. 67 provides as follows: "All powers by this Act or by any other Act of Parliament, law, or custom vested in or exerciseable by Commissioners of Sewers within the limits of their jurisdiction may, upon the constitution of a drainage district, be exercised by the drainage board of such district within its limits." Mr. van den Berg and Mr. Gorman for the plaintiff rely upon those words "within its limits," and suggest that even if, under the previous legislation of the Act of Henry VIII. and the Act of 1849, the Commissioners of Sewers might issue a distress warrant which could be executed anywhere in England, the Act of 1861 transferred their powers to the drainage board and limited the exercise of those powers within the limits of the area of the drainage board. I do not think that that is a sound argument at all. The act of issuing the warrant is no doubt a thing that must be done by the Commissioners of Sewers within their limits, and in turn by their successors, the drainage board, within their limits; but the question is, not as to where the drainage board is to do its executive act, or quasi judicial act, in issuing this warrant, but what are the legal limits within which goods may be seized in pursuance of that warrant, and I cannot think that s. 67 or anything else in the Act of 1861 at all affects that question.

I have now, I think, referred to all the legislative provisions that are concerned with this question, and have gone through all the learning and authorities of an ancient date that can be discovered by the industry of counsel. There are some modern references to this same matter in a learned work on the Law of Land Drainage and Sewers, by Kennedy & Sandars, published in 1884, where again, really only upon the authority of Callis, the law is laid down in the same terms. It is said at p. 124 that "the payment of a sewers rate may be enforced by distress, first on the goods and chattels, and secondly on the lands of the person in default," and at p. 126: "If no sufficient distress can be found, the rates, fines, costs, charges and expenses are to be levied upon the lands, tenements and hereditaments of the party charged which are situate within the Commission. A distress on the goods of the person may be taken at any place within the United Kingdom," and for that the authority of Callis and also of Herne and Comyn's Digest is given.

I think that the opinion of that very learned lawyer, Mr. Callis, was correct as to the effect of the original statute of Henry VIII., and I think the words of that statute have been unaffected by anything in the statute of 1849 or the statute of 1861. I agree with the learned author in his conclusion that a distress warrant properly issued against the goods of a person liable to a sewers rate may be executed upon the goods of that person if found at any place within, as he says, the realm of England. It is not necessary to go beyond that for the present purpose. The threat which in this case it is sought to restrain by injunction is to go a short distance outside the actual limit of the land administered by the drainage board to Mr. Morse's house. I think that the bailiff of the Commissioners holding that warrant is entitled to go to

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that place in order to seize the goods of Mr. Morse, and that being so, I think this action fails, and that there must be judgment for the defendants with costs. The interlocutory injunction will be discharged.

Judgment for defendants.

Solicitors for plaintiff: *Church, Adams, Tatham & Co.*

Solicitors for defendants: *Simmons & Simmons, for A. Bebbington, Cambridge.*

R. F. S.

THE KING *v.* LAPWORTH.

C. C. A.

1930
Oct. 20.

Criminal Law—Evidence—Indictment charging personal Violence by a Husband to his Wife—Wife called as Witness for Crown—Witness not only competent but compellable.

Where a husband is indicted for inflicting personal injury on his wife the wife is not only a competent but a compellable witness for the Crown.

APPEAL against conviction.

The appellant, John Henry Lapworth, was charged on July 10, 1930, at the Warwickshire Assizes, before Rowlatt J., upon an indictment containing counts: (1.) That he on July 4, 1930, attempted to strangle Beatrice Annie Lapworth with intent to murder her; (2.) that he caused grievous bodily harm to Beatrice Annie Lapworth with intent to do her some grievous bodily harm; (3.) that he maliciously inflicted grievous bodily harm upon her.

The appellant pleaded not guilty.

Beatrice Annie Lapworth, who was the wife of the appellant, was called as a witness by the prosecution. When she had been sworn, counsel for the appellant, Mr. Douglas Jenkins, said: "My Lord, this woman ought to be warned." Rowlatt J., addressing Beatrice Annie Lapworth, said: "Do you mind giving evidence against your husband?" and she replied: "I would rather not." Counsel for the appellant then submitted that Beatrice Annie Lapworth, although a competent was not a compellable witness against her husband. Rowlatt J. overruled this contention, and, addressing the witness, said: "You must give evidence, Mrs. Lapworth." Beatrice Annie Lapworth then gave evidence for the Crown. The appellant was convicted on the second count of the indictment of causing grievous bodily harm to Beatrice Annie Lapworth with intent to do her some grievous bodily harm. He was bound over in the sum of 10*l.* to keep the peace and to be of good behaviour for twelve months. The appellant appealed on the ground that Beatrice Annie Lapworth, his wife, who had expressed her wish not to give evidence for the Crown, was directed to do so by the learned judge.

Douglas Jenkins for the appellant. The question is whether on this indictment Beatrice Annie Lapworth, the wife of the appellant, was not only a competent but a compellable witness for the Crown. In Roscoe's Criminal Evidence, 15th ed., it is stated at p. 148 that there seems to be no decision on the point, and there is no such decision in this country. But in South Australia it was held by Angas Parsons J. that where a wife is charged with wounding with intent to murder her husband, the husband is a competent but not a compellable witness against the wife, and the witness should be cautioned by the judge that he is not obliged to give evidence against his wife: see *Rex* v. *Phillips.* (1) But there the husband was a competent witness by virtue of s. 1 of the Australian statute—The Evidence Act, 1882 (No. 245 of 1882)—which permitted an accused person and his or her wife or husband to be a competent witness, and the learned judge followed the decision in *Leach* v. *Rex.* (2)

[Avory J. But by the common law of England the wife was always a competent witness where the indictment was against her husband for inflicting personal injury upon her. When at common law a witness has been competent, it has always been within the normal jurisdiction of the Court for the judge to direct the witness to give his or her evidence.]

[Swift J. I cannot find any difference in the cases between the position of a wife who is at common law a competent witness and that of any other witness. She can be summoned to the witness box; she is liable for perjury. The investigation is not one of a mere quarrel between husband and wife, but of a crime against the peace.]

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(1) [1922] S. A. S. R. 276.

(2) [1912] A. C. 305.

Angas Parsons J. said in *Rex* v. *Phillips* (1): "The Criminal Evidence (England) Act, 1898, s. 4, has, in my opinion, merely added other occasions when the husband or wife of an accused person shall be a competent witness for the prosecution, and as the House of Lords has decided that on these added occasions a witness, though competent, is not compelled to give evidence, neither do I think that on those occasions when by the common law a witness is competent should I hold him to be compellable." This decision was based on that in *Leach* v. *Rex* (2), where Lord Atkinson said: "The principle that a wife is not to be compelled to give evidence against her husband is deep-seated in the common law of this country, and, I think, if it is to be overturned it must be overturned by a clear, definite and positive enactment, not by an ambiguous one such as the section relied upon in this case." (2) In the course of the argument in *Leach's* case (2) Lord Loreburn L.C. said: "There may be something more than justice and innocence at stake. It might be thought better that a guilty person should escape, than that homes should be made impossible by husband and wife being compelled to divulge things against one another." (3) When a husband is indicted for personal injury to his wife, the wife was always at common law a competent witness but never compellable. To hold that such a witness is compellable to give evidence against her husband is to violate a principle which was described in *Leach's* case (2) by Lord Loreburn L.C. as fundamental, by Lord Halsbury as "ingrained in the English Constitution," and by Lord Atkinson as "deep-seated in the common law of this country."

Anthony Hawke for the Crown. There is no principle of English criminal law that a wife, when competent, is not compellable; the common law principle is that all competent

(1) [1922] S. A. S. R. 276, 281. (2) [1912] A. C. 305, 311.
(3) (1912) 7 Cr. App. R. 157, 164.

witnesses are compellable. The decision in *Leach* v. *Rex* (1) is not relevant here, for that was a decision on s. 4 sub-s. (1) of the Criminal Evidence Act, 1898, by which: "The wife or husband of a person charged with an offence under any enactment mentioned in the Schedule to this Act may be called as a witness, either for the prosecution or defence, and without the consent of the person charged." Before the year 1898 the wife or husband of a person charged with those specified offences was prohibited from giving evidence. The statute rendered such a wife or husband a competent witness, and the decision in *Leach* v. *Rex* (1) was that on the words of the statute she or he was rendered a competent witness only—not compellable. But where the offence charged against one spouse is that of inflicting personal injury on the other, the spouse alleged to have been assaulted was always at common law a competent, and, it is submitted, a compellable witness. In *Leach's* case (1) the decision of the House of Lords is that where competency is conferred by statute on a witness who otherwise could not give evidence, competency did not necessarily involve compellability. The case of *Rex* v. *Phillips* (2) is a similar decision on an Australian statute following the decision of the House of Lords in *Leach's* case. (1) The observation of Angas Parsons J. in *Rex* v. *Phillips* (2), "Neither do I think that on those occasions when by the common law a witness is competent should I hold him to be compellable," is obiter and erroneous. In *Lord Audley's* case (3) a wife was held a competent witness to prove that her husband was present and aided and abetted another in committing a rape upon her. It was not suggested in that case that Lady Audley was not a compellable witness. There is no case where it has been held that at common law a wife was a competent witness against her husband in which it has not been assumed that she is also compellable. There is no record of a wife in such a case ever having been asked if she was willing to give evidence or warned that she was not bound to do so.

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(1) [1912] A. C. 305.
(2) [1922] S. A. S. R. 276, 281.
(3) (1631) 3 St. Tr. 401.

[Acton J. In your view the Law Lords in *Leach's* case (1) had not in mind the case of injury by one spouse to the other? Lord Loreburn L.C., Lord Halsbury and Lord Atkinson all state the principle in the widest terms. Lord Loreburn said: "It is a fundamental and old principle to which the law has looked, that you ought not to compel a wife to give evidence against her husband in matters of a criminal kind." (2)]

It is clear that the Law Lords had not any of the excepted cases of competency at common law in mind. In Cockle's Cases and Statutes on Evidence, 4th ed., p. 263, and in Roscoe's Criminal Evidence, 15th ed., p. 448, the point is expressed to be one of doubt on which there is no decision.

The judgment of the Court (Avory, Swift, and Acton JJ.) was delivered by

Avory J. The question that has been raised and argued before us is whether in a case charging personal violence as having been used by a wife to her husband or by a husband to his wife, the husband or wife, as the case may be, is not only a competent but a compellable witness for the prosecution. There is no doubt that at common law the husband or wife was always a competent witness in such a case, and by the very nature of things it must have been so, for otherwise, where the assault was committed in secret by one spouse upon the other, there would be no means of proving it. Whatever the reason, we are satisfied that at common law the wife was always a competent witness for the prosecution when the charge against her husband was one of having assaulted her. Once it is established that she is a competent witness, it follows that she is a compellable witness; that is to say that she, having made her complaint of, or independent evidence having been given of, an assault on her by her husband, and she having been summoned, as she may be, she is, like all other witnesses, bound to answer any questions put to her. In other words, she becomes a compellable witness.

It is said that there is no direct authority on this point. It does sometimes happen, where it has been recognized generally

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(1) [1912] A. C. 305

(2) [1912] A. C. 305, 309.

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that a certain state of the law exists and where it has never been called in question, that there is no direct authority. I doubt whether this question has ever been raised before in this direct fashion so as to provide a decision. In every day practice it has been assumed that if a wife so situated on coming into Court expresses a desire not to, or a reluctance to, give evidence for the Crown it is the duty of the Court, in order to ascertain the facts, to direct her to give evidence and, if necessary, to compel her to do so.

It has been suggested that in the case of *Leach* v. *Rex* (1), in which the indictment was for incest, argued before the House of Lords in the year 1912, the speeches of the Law Lords contained expressions which are inconsistent with the view of the law that I take, and in particular the following passage from the speech of Lord Atkinson: "The principle that a wife is not to be compelled to give evidence against her husband is deep-seated in the common law of this country, and I think if it is to be overturned, it must be overturned by a clear, definite and positive enactment, not by an ambiguous one such as the section relied upon in this case." (2) There are passages in the speeches of Lord Halsbury and of the Lord Chancellor (Lord Loreburn) to the same effect. But it must be borne in mind that the House of Lords in that case was dealing with the effect of a statute, s. 4 of the Criminal Evidence Act, 1898, which had expressly authorized a wife or a husband to give evidence against their spouse in certain cases. An observation made by Lord Halsbury in that case confirms me in the view of the law that I have expressed when he said: "I should have thought that if the known state of the law was that in order to confer competency you had to enact it, the fact that you simply used the word 'competent' did not necessarily mean 'against his or her will.'" (3) I read that as meaning: if the known state of the law is such as to confer competency without a statute, then compellability follows as a matter of course from that fact. We are satisfied that in the case of

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(1) [1912] A. C. 305.

(2) [1912] A. C. 311.

(3) 7 Cr. App. R. 157, 166.

Leach v. *Rex* (1) the Law Lords had not present to their minds the case, which is now before this Court, where personal violence was alleged to have been done by a wife to her husband or by a husband to his wife, and that they had no intention of including such a case in their observations.

In our opinion the learned judge at the trial was right in holding that Beatrice Annie Lapworth, the wife of the appellant, was bound to give evidence for the Crown. The appeal, therefore, fails.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the prosecution: *Director of Public Prosecutions.*

C. G. M.

COLLYER (INSPECTOR OF TAXES) *v.* HOARE AND COMPANY, LIMITED.

C. A.
1930
Oct. 14, 15.

Revenue—Income Tax—Profits of Trade—Deduction of Expenses—Brewery Company—Tied Houses—Premiums paid by Tenants—Rent forgone for Purposes of Trade—Premiums taken into Account—Loss of Rent on specified Tied Houses—No Loss on Tied Houses in aggregate—No Deduction—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schedule D, Rules applicable to Cases* 1 *and* 2, *r.* 3.

A brewery company purchased from time to time licensed houses and let them on yearly tenancies or leases to tenants who were tied to the Company for all the beer, wine and spirits sold on the premises let to them. Under the decision in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* [1915] A. C. 433, the Company was entitled, in the computation of the profits of the trade for assessment under Schedule D to income tax to a deduction of the difference between the rents paid by the Company for its leasehold houses or the Schedule A assessment of its freehold houses, on the one hand, and the rents received by it from the tied tenants on the other hand. Some of the tied tenants paid premiums, and it was admitted in the course of the hearing that they must be taken into account in determining whether rent had been forgone by the Company by reason of the tie. The Company suffered

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(1) [1912] A. C. 305.

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a loss in respect of rent forgone on certain specific tied houses, but if the tied houses were considered in the aggregate there was no loss owing to some of the houses having been let at a large profit:—

Held (reversing Rowlatt J.'s decision), that it was only the aggregate loss sustained in providing a market as a whole for the sale of the Company's liquors by means of tied houses that could be deducted as an expense from the total profits of the Company's trade, and that, as there had been no such loss, no such deduction could be made.

Usher's Wiltshire Brewery, Ld. v. *Bruce* [1915] A. C. 433 discussed.

APPEAL from a decision of Rowlatt J. on a case stated under the Taxes Management Act, 1880, s. 59, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the above Commissioners held on May 14, 1924, for the purpose of hearing appeals, Hoare & Co., Ld. (hereinafter called "the Company") appealed against the following assessments to income tax made upon the Company under the provisions of Schedule D of the Income Tax Acts in respect of the profits of its trade:—

For the year ended April 5, 1918, in the sum of 70,000*l.*
" " " 1919, " " 114,583*l.*
less 7404*l.* wear and tear.
" " " 1920, in the sum of 145,805*l.*
less 6406*l.* wear and tear.
" " " 1921, in the sum of 215,000*l.*
" " " 1922, " " 205,000*l.*
" " " 1923, " " 220,000*l.*
" " " 1924, " " 180,000*l.*

2. The Company carried on the business of brewers at the Red Lion Brewery, St. Katherine's Way, E. Following a common practice among brewers the Company had in order to increase its trade purchased from time to time licensed houses, which it let on yearly tenancies, or for periods ranging from seven to twenty-one years, to tenants who were tied to the Company for all the beer, wine and spirits sold in the premises let. In very rare instances only were licensed premises let by the Company without such a tie. The

Company had a few free tenants. At the date of the appeal the Company had about 600 leasehold or freehold licensed houses let to tied tenants.

3. The tenants who were not tied to the Company were allowed a higher rate of discount for the goods purchased from the Company than was allowed to the tenants who were tied. On the other hand, a tenant who was not tied was charged a higher rent for the premises than a tied tenant would be, the difference in the rent being calculated by taking a percentage (5 per cent. in town and 3 per cent. in the country) of the cost price to the tenant of the normal quantity of beer sold annually in the house.

4. In a number of cases, which however formed only a small proportion of the total number of licensed houses, the tenant was charged a substantial premium for the lease in addition to the annual rent. A statement marked "A" was annexed to the case, giving particulars of all the leases —eleven in number—granted during the three years ended April 5, 1922, for which a premium was charged in addition to the rent and a statement marked "B" showing the value of the barrelage. Statement "A" also showed the rent which the Company would have expected to obtain had the houses been let to a tenant who was not tied on the footing that he also paid the premium in column 5 of the statement.

5. Under the decision in the case of *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1) the Company was entitled to a deduction in computing the profits of its trade for assessment under Schedule D of the difference between the rents paid by the Company for its leasehold houses or the Schedule A assessments of its freehold houses and the rents received by it from the tied tenants and also to a deduction for the amounts expended on repairs to its tied houses.

6. The Company in making up its own accounts brought into its own profit and loss account as items of receipt or expenditure all rents received and paid by it and also the premiums (spread over the periods of the leases in annual proportions) charged on granting the leases.

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(1) [1915] A. C. 433.

Nothing was debited in the Company's accounts in respect of the annual value or rent forgone or sacrificed in respect of the Company's own freehold properties, whether occupied by the Company or let to tied tenants, and evidence of a chartered accountant called by the inspector of taxes was given to the effect that no such deduction could properly be made in computing commercial profits, and the Company did not dispute this evidence.

7. It was contended on behalf of the Company :—

(1.) That the premiums received on the grant of the leases of the licensed houses were not receipts arising from its trade as brewers.

(2.) That notwithstanding the receipt of the premiums the whole of the difference between the rents paid for the licensed houses (or the Schedule A assessments thereon) and the rents received by the Company was admissible as a deduction in computing the profits of the Company for assessment under Schedule D.

(3.) That on either view the premiums should be wholly excluded from the Company's profits for the purpose of such assessment.

8. It was contended on behalf of the Crown (inter alia) :—

(1.) That all receipts of the business on revenue account and all expenses of the business on revenue account must be included in the account made out to compute the profits made by the trader in his business.

(2.) That the premiums as received or a part of the premiums as shown in the Company's own accounts or arrived at on an actuarial basis and also all rents as received were therefore includable in computing the profits for the purpose of Case I. of Schedule D.

(3.) Alternatively if such premiums or parts of such premiums and rents were not so includable they should be taken into account in ascertaining whether there had been a deficiency of rent or rent forgone or otherwise.

(4.) That the debit entry as to the annual value of the property dedicated to the business in the case of freehold houses was the amount of the assessment under Schedule A as reduced for the purpose of collection under r. 7 of No. V. of Schedule A.

9. The Commissioners held that the premiums received by the Company on the grant of leases were not receipts arising from its trade as brewers, and that no regard should be had to those premiums in arriving at a deduction in computing the Company's profits under the decision in the case of *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1)

They also held that the excess of rents received by the Company over rents paid by it (or in the case of freehold premises over the Schedule A assessments) should not be brought into the computation of the Company's liability.

They accordingly held that the premiums and any excess of rents should be altogether excluded in the computation of the Company's liability under Schedule D in respect of the profits of its trade.

10. The Commissioners adjourned the appeal for the correct amounts of the said assessments to be ascertained having regard to the principles decided by them. These amounts were subsequently agreed, and on February 17, 1926, they gave their final determination of the appeal amending the said assessments to the following amounts :—

For the year ending April 5, 1918 . .	31,622*l.*
,, ,, ,, 1919 . .	47,347*l.*
,, ,, ,, 1920 . .	100,806*l.*
,, ,, ,, 1921 . .	142,911*l.*
,, ,, ,, 1922 . .	185,346*l.*
,, ,, ,, 1923 . .	178,608*l.*
,, ,, ,, 1924 . .	194,587*l.*

On July 5, 1928, Rowlatt J. affirmed the decision of the Commissioners, holding that premiums were not taxable profits and that they could not be taken into account in determining whether the Company had suffered a loss by reason of the tie which could be brought in as an expense against the profits of the business for income tax purposes. Lastly, he held that the position in regard to each licensed house must be considered separately, so that the profits on any particular house could not be taken into account to reduce the loss suffered in respect of other houses.

(1) [1915] A. C. 433.

The Crown appealed. The appeal was heard on November 2, 5, 7, and December 20, 1928. On the last date the Court of Appeal, not being satisfied that they had before them sufficient materials to enable them to decide the questions in issue, made an order that the Case stated should be remitted to the Commissioners for them to state the following further facts :—

" (1.) Whether the premiums mentioned in the first sentence of para. 4 of the said Case or any part of them in any form as a matter of accountancy should be taken into account for the purpose of ascertaining commercial profits over any given period.

" (2.) Whether the rents stated in the final column of the statement 'A' annexed to the said case are such as could have been obtained in the open market from free tenants in addition to the premiums mentioned in the said statement and, if not what is the rent that could have been obtained from a free tenant in each case paying the same premium.

" (3.) Whether the said statement 'A' is a full list of the houses for which premiums were paid by the tenants for leases or tenancy agreements which were in force during the whole or any part of the nine years ended 18th April, 1922 (the date on which the Company makes up its accounts). If not what other such houses were there and what was the rent that could have been obtained for the same from a free tenant in each case paying the same premium.

" (4.) Whether in the light of the decision in the case of *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1) and of the facts in the present case a part of the business of the respondents was the providing of licensed houses as a market place for the beer brewed."

On January 1, 1930, the Commissioners made their further findings of fact as follows :—

" In compliance with the order, dated the 20th December, 1928, we have to state the following further facts :—

" 1. The premiums should be taken into account in ascertaining the commercial profits of the respondents' business.

(1) [1915] A. C. 433.

The premiums apportioned over the respective periods of the leases should preferably be treated as revenue receipts, or alternatively should be included in the rent account for the purpose of ascertaining the balance of that account to be brought into the profit and loss account of the business.

"2. The rent which could have been obtained from a free tenant of the houses in statement 'A' paying the same premium as that shown in the statement was as follows :—

Falcon, Ponders End	Nil.
24 Orford Street, Walthamstow	65*l.*
Crown and Sceptre, Britannia Street	180*l.*
Junction Tavern, Raynes Park	220*l.*
King's Head, Hogarth Place	– 260*l.*
Greyhound, Richmond	450*l.*
White Hart, Brasted	Nil.
Six Bells, Croydon	50*l.*
Plough and Harrow, Epsom	100*l.*
Dewdrop, Penge	70*l.*
Railway Hotel, Beckenham	– 500*l.*

Where the rent is stated to be a minus quantity a free tenant having undertaken to pay the premium named should be entitled to a refund of the figure shown from the owners.

"3. There were 21 houses in addition to those shown in statement 'A' for which premiums were paid by the tenants for leases or tenancy agreements which were in force during the whole or any part of the 9 years ended the 18th April, 1922."

A statement marked "B" of these 21 houses is annexed. The rent that could have been obtained for these houses from a free tenant paying the same premium in each case is shown in column 6 of the statement.

"4. The providing of licensed houses as a market-place for the beer brewed by the respondents formed a part of their business."

The amounts set out in column 6 of the statement marked "B" were – 134*l.*, +250*l.*, +70*l.*, – 383*l.*, – 490*l.*, – 293*l.*, +150*l.*, nil, +250*l.*, +300*l.*, nil, +250*l.*, +175*l.* and nil.

The appeal, having been restored to the paper, was re-argued on the further facts found by the Commissioners on October 14 and 15, 1930.

Hon. Stafford Cripps K.C. and *R. P. Hills* (with them *Sir William Jowitt A.-G.*) for the Crown. The premiums paid by tied tenants must be taken into account in the calculation of the expenses incurred for the purposes of the trade in securing a market under *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1) That case decided that where a brewery company lets licensed houses to tied tenants, the brewery company could for income tax purposes deduct from its profits any "rent forgone" for the sake of the tie as a necessary expense. Here if the premiums paid by tied tenants are taken into account, there is no loss to the Company. The figures showed that there was actually about 1000*l.* more received from the tied tenants than would have been received from free tenants paying the same premium; and it is therefore impossible to say that any rent was forgone for the purposes of the trade. The Company has in fact dealt with the premiums in its accounts as if they were additional rent. The figure to be compared with the Schedule A assessments is the tied rent plus a proportion of the premium ascertained by spreading it over the number of the years of the tied tenant's lease. If that be done, there is not only no rent forgone but an actual profit to the Company. It is true that according to the decision of the House of Lords in *Fry* v. *Salisbury House Estate, Ld.* (2), the assessment under Schedule A on property is exhaustive in respect of the rents received; but the Commissioners have found that the provision of tied houses is part of the Company's business as brewers and therefore, although the premiums received cannot be brought into the profit and loss account for taxation under Schedule D, yet the premiums must be brought into an ancillary account (as additional rent) in order to vouch the alleged rent forgone, before the Company can say what the provision of tied houses has actually cost.

[ROMER L.J. The question is whether the Company has spent money in getting the trade, when a calculation including the premiums would show that it had not in fact spent anything.]

(1) [1915] A. C. 433.

(2) [1930] A. C. 432.

Yes. In order to apply the principle of *Usher's* case (1) the cost of providing the market for the Company's beer must be calculated, and there can only be a deduction in respect of expenses if the figures show a net loss of rents in the process. Here if the total rents received include the total premiums received, there is no expense which can be deducted on this principle. The Court must be satisfied that there is rent forgone for the sake of the tie. For this purpose there must be a separate account, showing on one side the outgoings or Schedule A assessments and on the other the rents and premiums received. The result is to show that there is no loss. The *Salisbury House* case (2) can be harmonized with *Usher's* case (3) in the manner stated by Lord Warrington in the former case. (2)

A. M. Latter K.C. and *Cyril King* for the Company. Premiums are not taxable revenue. A premium is capital, and whether reserved or paid, it must be excluded from taxed receipts: *Watney* v. *Musgrave* (4); *Gillatt & Watts* v. *Colquhoun.* (5)

[LORD HANWORTH M.R. The former case cannot stand since *Usher's* case (3), and the headnote in the latter case suggests that the case was merely one of wasting assets like *Alianza Co., Ld.* v. *Bell.* (6)]

The Crown are here seeking to decapitalize the premiums and to treat them as annual income. Premiums can never be brought into a trade account, unless the taxpayer's business is to buy and sell land: *MacTaggart* v. *B. & E. Strump.* (7) It is not suggested that the Company in this case is a dealer in property.

But while the premiums cannot be brought in as taxable revenue, they can, it is admitted, be taken into account in determining whether any rent has been forgone by reason of the letting of premises to a tied tenant. The effect of

(1) [1914] 1 K. B. 357, 365; [1915] A. C. 433, 443, 454, 458, 463.

(2) [1930] A. C. 432.

(3) [1915] A. C. 433.

(4) (1880) 5 Ex. D. 241, 246.

(5) (1884) 2 Tax Cas. 76.

(6) [1906] A. C. 18.

(7) (1925) 10 Tax Cas. 17.

Usher's case (1) is that if on the deduction of the rent received from the tied tenant from the annual values there is shown to be a loss, that loss can be brought into account against trade profits for income tax purposes. For this purpose it has to be shown that rent has been forgone by reason of the tie, and to the extent that it has been forgone for the sake of a premium or for any other reason unconnected with the trade, there is not a loss which can be taken into account in assessing the profits of the trade. No claim to a deduction is therefore established in cases where it cannot be proved that the tied tenant paying a premium has paid less rent than a free tenant paying the premium would have paid. It has to be shown that an expense has been incurred in earning the gross receipts. In the present case no loss is established in regard to some of the licensed houses let to tied tenants. In some cases there is even a gain. Those cases can be disregarded, but in other cases a loss is shown after taking into account the premium paid, and that is an expense which ought to be deducted from the profits of the trade. It is true that in some cases there is a profit received over and above the annual value, but that is not liable to tax : *Fry* v. *Salisbury House Estate, Ld.* (2)

[SLESSER L.J. It is said that the gain in one case wipes out the loss in another.]

That is not a proper consideration. It is not a case for aggregation, but each property must be considered separately, and in any case where there is shown to be rent forgone for the sake of the tie that can be brought in as a deduction from the trade profits. The case where there is no expense incurred must simply be disregarded.

[LORD HANWORTH M.R. Is there any principle upon which regard can be had to the expenses of individual licensed houses for the purpose of making a deduction from the aggregate profits of the trade ? It is not what was done in *Usher's* case. (1)]

In *Usher's* case (1) all the tied houses were let at less than the annual value, so that the question did not strictly arise;

(1) [1915] A. C. 433.

(2) [1930] A. C. 432.

but logically it must be the individual loss which has to be taken into account.

Hon. Stafford Cripps K.C. in reply. It is admitted that the premiums cannot be taken into account as profits of the trade assessable under Schedule D. But in arriving at the expenses of providing the market for the sale of the Company's beer under *Usher's* case (1), they must, as has been admitted, be taken into account. It has been suggested that in the case of freehold houses belonging to the Company, the question whether rent has been forgone should be ascertained by comparing the rent paid by the tied tenant to that paid by a hypothetical free tenant paying the same premium. It is submitted this is not so, but that an addition should be made to the rent paid by the tied tenant in respect of the premium paid by him and the total rent compared with the assessment under Schedule A. For income tax purposes the Schedule A assessment must always be treated as the value. This accords with the first paragraph of the supplementary findings of the Commissioners. Further it is only the aggregate loss (if any) that can be deducted from the profits of the trade. The expense to be carried in is the costs of providing the market and not, so to speak, of providing a particular booth in the market. *Usher's* case (1) shows that what was being considered was the expense of providing the market-place. This has to be ascertained when all material considerations have been taken into account. There is no justification in that case for segregating a particular licensed house, and considering the position as to that and when the matter is considered as a whole it is clear here that no expense has been incurred in providing the market.

LORD HANWORTH M.R. This case involves a number of points of law of some difficulty, the difficulty arising from the question how the law is to be applied to the facts of the case.

The case has been before this Court before, but was sent back to the Commissioners for them to make further findings for the information of this Court. I will recount the facts,

(1) [1915] A. C. 433.

therefore, with some care, for the sequence of events is important. [His Lordship stated the facts set out in the special case.] The Company claim to apply the decision in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1), a case of great importance which was first decided by Horridge J. in December, 1913. That case went to the Court of Appeal, and ultimately to the House of Lords, and I shall have to refer to it later. In r. 3 of the Rules applicable to Cases 1 and 2 of Schedule D to the Income Tax Act, 1918, there is a restriction providing that in computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of " any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation." That rule has been re-written by Lord Sumner in his judgment in that case in which he says it amounts to this, that in computing the profits a trader is entitled to deduct money which is wholly and exclusively laid out or expended for the purposes of the trade.

In *Usher's* case (1) the Company, being desirous of making a large market for the sale of their liquors, adopted the practice notoriously common among brewers—of providing licensed premises which tenants occupy who are tied to the brewery in the sense that they can sell at those premises only the beers and liquors provided by the brewer. It was claimed in *Usher's* case (1) that the expense which was involved in that system could not be deducted. Two items in particular were in question in *Usher's* case (1); there were other smaller ones, but I need not deal with them. The two items were: Repairs to tied houses, 1004*l.*, and " difference between rents of leasehold houses or Sched. A assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand," 2134*l.* It was said, in respect of the repairs, that there was a special Rule under the Income Tax Act whereby certain allowances are allowed for repairs, and no more, and with regard to the second item (the difference between the rents that were in fact charged to the tied tenants and those

(1) [1915] A. C. 433.

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which would have been charged if the particular tie had not been insisted upon) that that margin or difference which represented a loss to the brewers could not be deducted as being an expense which had been wholly and exclusively incurred for the purposes of the trade. The House of Lords, however, disagreed with that view, and they allowed the sums which had been paid by the brewers in respect of repairs, and the losses which the brewers had suffered in consequence of maintaining this tied system to be deducted. The House of Lords said that, although the brewers were not bound to effect these repairs, although they had done them ex gratia to oblige their tenants, yet they had done them as a part of a policy, finding that generosity to their tenants had inured to the advancement of the sale of their liquors, and equally that the loss incurred in the maintenance of the tie was incurred for the purpose of enhancing the sale of their liquors. They held therefore that the sum expended in the one case and the sum lost in the other case were sums which were wholly and exclusively laid out or expended for the purposes of the trade.

In the present case the brewery company, Messrs. Hoare & Co., Ld., ask that an allowance should be made to them in respect of losses which they have incurred by not securing from the tied tenants the full rents that would have been available if no tie had been insisted upon. Table "A" gives the facts about some eleven licensed premises. The answer made to that on the part of the Crown was that if the individual cases were examined where a lower rent was received by the brewery company from the tied tenant it would be found that the tenant had paid a premium, and that it was because of the premium paid down that the tenant had been allowed to pay a smaller rent over the period of his lease. The answer to that by the respondents was that these premiums must not be taken into account because they were capital payments, and not taxable profits. Upon those arguments the Commissioners held that the premiums received by the Company on the grant of leases were not receipts arising from its trade as brewers, and that no regard should be had to those premiums in arriving at the amount of the deficiency of rents to be allowed as a deduction in computing the Company's profits under the decision in *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1) They further held that the licensed houses were to be considered separately and that the excess of rents received by the Company over rents paid by it (or over the Schedule A assessments in the case of freehold premises) should not be brought into the computation of the Company's liability; and the ultimate decision of the Commissioners was that the premiums and any excess of rents should be altogether excluded from the computation of the Company's liability to assessment. That decision was given in February, 1928.

The Crown appealed, and the case came before Rowlatt J. who, on July 5, 1928, gave judgment supporting the decision of the Commissioners. He was of opinion that *Usher's* case (1) allowed a deduction to be made from the profits of the Company when computing them for income tax purposes even though a manager or a tied tenant was in occupation of a licensed house, if that house had imposed a burden upon the income of the brewer by reason of the maintenance of the tie. From that decision an appeal was taken to this Court. It was heard on more than one day, and on November 7, 1928, this Court came to the conclusion that the full material necessary for the decision of the case was not before it. [His Lordship then stated the points referred to the Commissioners and the answers embodied in the supplementary case.]

Looking at the whole of the facts which the case and its supplement present to the Court, I find that there are two sides to the activities of Messrs. Hoare & Co., Ld. They quite properly and naturally follow the common practice of providing licensed houses as a market-place for the beer brewed by them, and the Commissioners find that in that department of their business the premiums should be taken into account, whether the number of houses is so large that upon an average the premiums which are paid when renewals take place may be treated as annual revenue, or whether each premium ought to be distributed over the period of the

(1) [1915] A. C. 433.

lease, and treated as revenue receipts, or, alternatively, included in the rent account for the purpose of ascertaining the balance of that account. At any rate it is clear from the findings of the Commissioners that the department of providing what Mr. Stafford Cripps has called the booths in the market-place for the sale of beer should be treated as one side of the Company's business; and it seems to follow that the individuality of the houses is not to be maintained in ascertaining whether or not there has been a profit or loss in the provision of those booths in the market-place. We have got to regard this business, which has roughly produced profits of 200,000*l.* a year, as having two sides to it, one, the sale of the beer, and the other the provision of the stalls at which the beer is sold. If there is a loss in respect of the provision of the stalls, that is to go against the profits made just as the cost of the brewing and delivery of the beer would be a debit item in the profit and loss account.

In the recent case of *Fry* v. *Salisbury House Estate, Ld.* (1), the House of Lords has definitely decided that where a company carries on a business which consists of dealing with the property in lands, tenements, hereditaments or heritages in the United Kingdom, that business falls to be taxed for income tax purposes under Schedule A. It is not a matter of choice on the part of the Crown or on the part of the subject. The estimation of the tax which is to be paid in respect of the annual value of those lands, tenements, hereditaments and heritages is to be computed in accordance with the rules under Schedule A. Hence, in respect of the premises which are used for the purposes of the sale of beer, income tax would be charged upon the Company under Schedule A. The profits from their trade are subjected to income tax computed under Schedule D, but, following the decision in the *Salisbury House* case (1), it is not open to the surveyor of taxes to bring over any overplus of profit beyond what has been charged under Schedule A and claim that it ought to be brought into an account of profits under Schedule D. The

(1) [1930] A. C. 432.

annual value of the lands, tenements and hereditaments is to be taxed once and for all under Schedule A, and if there is any overplus which is not reached under the rules of Schedule A it remains immune. The question that then arises is: Is it possible for Messrs. Hoare & Co., Ld., who have paid taxes under Schedule A, to say that *Usher's* case (1) justifies their investigating the position in regard to the licensed houses which were taxed under Schedule A, and saying that in the case of one or more of those houses they have suffered a loss in respect of the tie maintained which ought to be brought in as a deduction from the profits of the trade? Mr. Latter does not claim that right except upon proof that there has been, as regards any particular house, an actual loss to the Company in maintaining the tie. He takes by way of illustration one or two of the cases in the statement marked "A" annexed to the case. He says upon the facts relating to the Falcon in South Street, Ponders End, that his evidence is insufficient to show that there remains a burden upon the profits in respect of the maintenance of the tie. He says otherwise in the case of the off-licence at Orford Road, Walthamstow. He does however seek to deal with the facts relating to these cases separately and individually by houses. Can that be done? Mr. Latter's argument in support of it is based upon *Usher's* case. (1) He agrees that his argument involves a development of *Usher's* case (1), for it is to be noted that *Usher's* case (1) dealt with the total accounts. The figures in *Usher's* case (1) were these: From an assessment of 17,338*l.*, which was the total assessable profit of the brewery business, it was sought to deduct the total repairs to the tied houses—namely, 1004*l.*, and the total of the "difference between rents of leasehold houses or Schedule A assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand," 2134*l.* Exactly how those totals were reached we do not know, but it cannot be said that in *Usher's* case (1) the individuality of each separate licensed house was scrutinized. Mr. Latter's argument is that it follows as a logical sequence. I do not agree with that view, after carefully examining the speeches of the noble Lords in *Usher's* case. (1)

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(1) [1915] A. C. 433.

It must be remembered that *Usher's* case (1) was a development of a sequence of cases. In *Russell* v. *Town and County Bank* (2) the bank was allowed to deduct the cost of premises in which it had placed a manager, for, in obtaining its profits, it was necessary to have a manager, and the cost of providing him with a house was a necessary outlay, integrally connected with the seeking of the profits.

Usher's case (1) definitely overruled *Brickwood & Co.* v. *Reynolds* (3), which was a case in which the brewers sought to deduct the repairs to tied houses which had been paid for by them from the profits of their business in arriving at their profit and gains for income tax purposes. A. L. Smith L.J. said this (4): "Now there are two things wholly distinct and apart the one from the other, the trade of a brewer and the trade of a publican, and the expense incurred in respect of the latter cannot in my judgment be deducted when finding out the profit of the former. When the brewer is making up his balance of profits and gains, he would on the one side place to his credit the beer and other articles sold and paid for, and on the other side he would place to debit the necessary expenditure for earning those receipts, and the difference between the two would, as Lord Herschell pointed out in *Russell* v. *Town and County Bank* (5), be the balance of the profits and gains of the trade on which the brewer would have to pay income tax. But the contention of the appellants comes to this—that inasmuch as by doing the repairs to the tied houses they keep up and foster the trade of the publican, which is a wholly independent trade, they are entitled to deduct the cost of the repairs to the publicans' houses before arriving at the balance of the profits and gains of their own trade as brewers. I am of opinion that that contention cannot prevail, and I agree with what Hawkins J. said in *Watney* v. *Musgrave*" (6): "The house, it is true"—that is the tied house—"is or may be a valuable adjunct to the brewery, by increasing the number of consumers ; but the house, whether it yield a profit or loss to the brewer, is not in the least connected with the trade profit of the brewery." A. L. Smith L.J., in supporting that view of Hawkins J., clearly indicated that this business of keeping the tied houses was wholly independent of the brewer's trade. Lord Atkinson in his speech in *Usher's* case (1), says this : "The decision"—in the case of *Brickwood & Co.* v. *Reynolds* (2)—"it would appear to me from the judgment of A. L. Smith L.J., pp. 102, 103, is based upon two propositions. (1.) That the trade of a publican in a tied house is altogether independent of the trade of the brewer, and therefore the entire of the expenditure of money on the repairs of the houses could not be held to be expenditure wholly and exclusively for the purposes of the brewer's trade since it was, in addition, expended for the benefit of the trade of the publican. With infinite respect for the Lord Justice I think this proposition is based upon a fallacy. The publican's trade is the vending of the landlord's beer and none other. The house is the market-place for that beer and none other. The brewer takes the house, ties it to his brewery, and puts the publican into it as tenant for the very purpose of having his beer sold in that market through the efforts of this salesman, the tied tenant. The two trades are as dependent upon and as connected with each other as they well can be ; they are almost, if not altogether, the same enterprise seen from different sides, different standpoints, and I confess I am unable to see upon what principle money designedly spent by the brewer with the sole and exclusive object of maintaining this market-place for his own goods, and promoting, through the action of this salesman, the sale of those goods therein, ceases to be an expenditure wholly and exclusively for his (the brewer's) trade because incidentally it may benefit the salesman." I have looked back at *Brickwood & Co.* v. *Reynolds* (2) and *Watney* v. *Musgrave* (3) in order to mark the distinction which is drawn by Lord Atkinson in his

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(1) [1915] A. C. 433.
(2) (1888) 13 App. Cas. 418.
(3) [1898] 1 Q. B. 95.
(4) Ibid. 102.
(5) 13 App. Cas. 418, 424.
(6) (1880) 5 Ex. D. 241, 246.

(1) [1915] A. C. 433, 455.

(2) [1898] 1 Q. B. 95.

(3) (1880) 5 Ex. D. 241, 246.

judgment in which he agreed with the rest of the noble Lords, as showing that this business of providing the tied houses is a part, and an integral part, of the brewer's business. In those circumstances the House of Lords in *Usher's* case (1) allowed the totality of the expense incurred in providing the tied houses and executing the repairs to be deducted from the totality of the profits made.

So here, if there was found to be a loss in carrying on this provision of licensed houses which forms a part of the business, as the Commissioners tell us, I suppose that would be carried as a debit to the profit and loss account against the profits which are again considered and treated as a whole; but it is quite a different matter to say that when the houses have been provided, and an expense has been incurred in respect of one, though a profit has been made in respect of another, the individual loss on the particular house can be brought in and set against the total profits earned, and that *Usher's* case (2) justifies such an attempt. It appears to me that *Usher's* case (2)—in which, be it observed, there were no premiums paid—deals with the business as a whole, and treats the provision of the houses as a part of the business of the brewer. We have now, upon the materials before us, a clear indication that the business of Messrs. Hoare has these two limbs, and that in the case of the department concerned with the provision of tied houses there ought to be an aggregation of the sums received and expended in that department, leaving a single lump sum to be carried to the profit and loss account of the business as a whole. Mr. Latter's argument is that, quite apart from the general account of that department of the business, individual items can be looked at, and that if there is a loss established in regard to any single licensed house, that particular loss may be brought in as a deduction from the aggregate profits. I desire emphatically to say that the assessment of the licensed houses must be under Schedule A, and that this assessment is rightly taken as being the value of the house. Nothing that I am saying impinges at all upon that; but I find no warrant in *Usher's* case (2) for splitting up the

(1) [1915] A. C. 433, 455. (2) [1915] A. C. 433.

totality of the expenses of the tied houses, and in individual cases where there is a loss, asking that that particular loss should be deducted from the total profits of the business. The vending of the beer and the provision of a place to sell it in are really one and the same trade; and I think it is not only Lord Atkinson who says that, but Lord Sumner also says (1): "I think that the judgment appealed against really finds facts, and does not, as it was supposed to do, rule the law, when it declares that the rents forgone are losses of annual value and not expenses of trade, that the described expenses are moneys laid out partly for the publican's trade, and, therefore, not 'wholly and exclusively' for the brewer's trade, and that such moneys enter into a computation of the profits or gains of the brewer's trade because, in the view of the Court, they also enhance the value of his goodwill," clearly indicating that he was treating the rents forgone as losses of the trade of the brewer.

In the *Salisbury House* case (2) two of the learned Lords indicated that *Usher's* case (3) was irrelevant to the question before them, and certainly nothing that we are deciding to-day in any way alters or varies the principle laid down in the *Salisbury House* case (2); but we are unwilling to say that the principle of *Usher's* case (3) applies here so as to enable some individual loss on a tied house to be set against the profits of the business as a whole, when the business of providing premises for the sale of the Company's beer is an integral part of the brewery business.

In those circumstances the appeal will be allowed, but the case will have to go back to the Commissioners for the purpose of ascertaining the true amounts of the assessments.

SLESSER L.J. After the exhaustive judgment of my Lord in this case it is not necessary for me to use many words to explain why I find myself in agreement with him.

In my view this case raises a problem which was not decided in *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (3) In that case

(1) [1915] A. C. 433, 467.

(2) [1930] A. C. 432.

(3) [1915] A. C. 433.

there was a difference between the value of the licensed houses to the world and the rents which were given by tied tenants, and this loss was an expense to which the Brewery Company was put in obtaining a market for the sale of its beer. The question which had to be decided was whether the admitted expenditure or loss set out in the Case, as regards repairs of tied houses, the difference between the rents of leasehold houses or the Schedule A assessment of freehold houses and the rents received from tied tenants, fire insurance premiums and legal costs, were expenses which could be deducted from the profits of the trade for income tax purposes having regard to r. 3 of the Rules applicable to Cases I. and II. of Schedule D, as being disbursements wholly and exclusively laid out or expended for the purpose of the trade. In the present case, now that the matter has fully been considered by the Commissioners, it becomes clear that as regards the whole of the properties in question, if they are to be treated as one market in the aggregate, there is, in fact, no expense to which the brewers are put in order to earn their profits by the provision of a market; and, if that is the right way of looking at the matter, it must necessarily be an end of the case. If there be no expense at all, the problem whether or not the expense can properly be deducted does not arise. Mr. Latter argues, however, that the subject-matter under consideration consists of a number of different licensed houses; that in some cases there is a loss consisting of the difference between the rent which could have been obtained from a free tenant and the rent paid by the tied tenant, and that the losses in those cases may properly be regarded as expenses which fall to be deducted, having regard to *Usher's* case. (1) Stripped of certain complications—some of which have disappeared as the result of decisions in this Court and in the House of Lords in the *Salisbury House* case (2)—and of extraneous matter, the sole question which remains is whether or not the losses or gains resulting from the letting of the tied houses should be considered in the aggregate in order to ascertain whether

(1) [1915] A. C. 433, 448.

(2) [1930] A. C. 432.

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there is or is not in the result a loss. I have come to the conclusion that it is right and proper that the losses and gains should be aggregated, in other words, that one should consider whether any expense has been incurred in providing the market as a whole, and not whether it has been incurred in providing individual parts of that market. Lord Atkinson in *Usher's* case (1) said this: " But the balance of the profits and gains of the brewer's trade would, according to the methods of practical business men, be ascertained . . . . by deducting from the receipts what it costs to earn them." He is speaking there of the particular expense of providing tied houses and is applying the doctrine laid down in *Russell* v. *Town and County Bank* (2), where the Court was dealing with the practice of installing branch managers and providing them with houses. Reading that language, and the speeches of the other learned Lords, I think it is clear that the House was looking to the market as a whole, and not considering whether there had been an expense in providing some particular part of the market. The question they were asking themselves was: It being a necessary incident of a brewer's business that he shall have a market to vend his products, was there, or was there not, an expense incurred in the installation and maintenance of that market? I can see no authority at all for itemizing the expenses incurred in respect of the various public houses individually in the way suggested by Mr. Latter. I agree with my Lord that the whole of the authorities point in the contrary direction.

That view, in my opinion, concludes this case. When the market is regarded as a whole, it is clear that, far from costing the brewers anything, it either costs them nothing, or is positively a source of profit to them. Whether that source of profit is taxable or not does not arise here; but it has been decided that such a profit cannot be taxed under Schedule D. The sole question for us is whether in determining whether there are losses regard must be had to the market as a whole, or to parts of the market individually. If this had been one market in which there were many booths I fancy the

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(1) [1915] A. C. 432, 457.

(2) 13 App. Cas. 418.

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question could scarcely have arisen. It is a geographical accident that these various public houses are not entirely in the same curtilage, or in the same neighbourhood. It is only the geographical fact that they are scattered over several counties that has made it possible to argue that they might be regarded separately. I think there is one market, and the Brewery Company has failed to prove that it has been put to any expense in providing that market for the purpose of its trade. This appeal must be allowed.

ROMER L.J. I agree. The questions arising on this appeal, except in so far as they are covered by authority, fall within a very small compass. The principle to be applied is the principle established by the House of Lords in *Smith* v. *Lion Brewery Co.* (1) It was described by Lord Atkinson in the later case of *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (2) as follows: "Stated broadly, I think that doctrine"—namely, the doctrine of *Smith* v. *Lion Brewery Co.* (1)—"amounts to this, that where a trader bona fide creates in himself, or acquires a particular estate or interest in premises, wholly and exclusively for the purpose of using that interest to secure a better market for the commodities which in his trade he vends, the money devoted by him to discharge a liability imposed by statute on that estate or interest, or upon him as the owner of it, should be taken to have been expended by him wholly and exclusively for the purposes of his trade"; and, following that principle, it was held by the House of Lords in *Usher's* case (3) that where a brewery company, as a necessary incident of the profitable working of its brewery business, acquires and owns licensed houses which it lets to tied tenants who, in consideration of the tie, pay rents that are less than the full annual values, the Company is entitled to set off or to deduct the sum so lost in rents from the profits of its brewery business for the purposes of assessment to income tax on the ground that it was a loss exclusively incurred by the Brewery Company for the purposes of its business. In that case one of the sums that was allowed

(1) [1911] A. C. 150.

(2) [1915] A. C. 433, 448.

(3) [1915] A. C. 433.

to be deducted from the profits was a sum of 2134*l.*, which was stated to be the "difference between rents of leasehold houses or Schedule A assessments of freehold houses on the one hand, and rents received from tied tenants" of those houses on the other hand. Lord Sumner in dealing with that claim said (1): "In principle, therefore, I think that in the present case rent forgone, either by letting houses, which the brewers own, to tied tenants at a low rent instead of to free tenants at a full rack rent in the open market, or by letting houses in the same way, which they hire and then re-let at a loss, is money expended within the first rule applying to both of the first two cases of Schedule D, and that upon the findings of the special case, which are conclusive, it is 'wholly and exclusively expended for the purposes of such trade.'"

In that case the tied tenants had not paid any premiums in respect of their leases, but in the present case they have; and it is obvious that it is impossible to ascertain what rent has been forgone in the case of tied tenants by comparing the rent actually paid by a tied tenant, who has paid a premium for his lease, with the assessment under Schedule A. It seems to me that either one of two courses must be adopted: Either you must ascertain what rent the tied tenant would pay if he had not paid a premium—ascertaining that in the way indicated by Mr. Stafford Cripps, by spreading the premium over the term of the lease—and compare that sum with the Schedule A assessment, or you must ascertain what rent a free tenant would pay if he had paid the premium which the tied tenant paid, and compare that rent with the rent paid by the tied tenant. As I understand, the Crown would strongly object to the adoption of the second method of ascertaining the rent forgone. They say, and they may well be right in saying, that for all purposes of income tax the assessment under Schedule A is to be taken as the annual value of the premises. It is quite unnecessary in the present case to decide, however, which of the two methods should be adopted, because, whether you adopt the one or the other, it appears that, though in some cases the tied tenants are paying less than the annual value, or what a free tenant would pay, and in other cases more, yet the aggregate rents paid by the tied tenants are in excess of the total annual value, or the aggregate of the rents that would be paid by free tenants, as the case may be. Mr. Latter says that he is entitled to deduct the excess of the annual value or of what the free tenant would pay over the rent paid by the tied tenant, where there is an excess, and to disregard altogether those cases where the tied tenant is paying more than the annual value fixed by Schedule A, or the amount that a free tenant would pay.

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(1) [1915] A. C. 469.

The only question left on this appeal, as it seems to me, is whether he is right in so saying. In my opinion, for the reasons that have been given by the Master of the Rolls and Slesser L.J., it is not open to him to do that. For myself, I cannot understand how, for the purposes of ascertaining the cost to the Company of providing tied houses for the purposes of its trade, it can be correct to disregard the profits made by granting leases to tied tenants, and to look only at the cases where a loss has been sustained. In my opinion, the thing must be looked at as a whole. I therefore agree that this appeal should be allowed.

Solicitors: *Solicitor of Inland Revenue; Godden, Holme & Ward.*

H. C. G.

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1930
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OAKLEY *v.* LYSTER.

[1929. O. 1509.]

Conversion—Evidence—Assertion of Right of Property in Goods.

There may be a conversion of goods even though the defendant has never been in physical possession of them, if his act amounts to an absolute denial and repudiation of the plaintiff's right.

Dicta of Kelly C.B. in *England* v. *Cowley* (1873) L. R. 8 Ex. 126, 131 and of Atkin J. in *Lancashire and Yorkshire Ry. Co.* v. *MacNicoll* (1918) 88 L. J. (K. B.) 601, 605 approved.

APPEAL from a decision of MacKinnon J.

The plaintiff, a demolition contractor, agreed in 1925 to pull down an aerodrome on Salisbury Plain and to reinstate the land on which it stood. The work involved the removal of a large quantity of hard core and tar macadam, about 8000 tons in all, which became the property of the plaintiff, who arranged with the tenant of a farm on the opposite side of the road from the aerodrome to rent from him three and a-half acres of the farm whereon to dump the stuff. That arrangement was made, and the plaintiff dumped the stuff on that land. Thereafter he sold a portion of it, but at the material time there were about 4000 tons still undisposed of. In January, 1929, the defendant purchased the freehold of the farm on which the 4000 tons were stacked. Shortly thereafter the plaintiff became aware that some of the hard core was being removed, and thereupon he saw the defendant, by whose instructions he understood this had been done. The defendant said that he had bought the land and all that was on it, and on July 9, 1929, his solicitors wrote to the plaintiff a letter in which they said: "We would inform you that Mr. Lyster [the defendant] purchased this farm in January last, and the hard core stacked thereon of course belonged to him. . . . . You must not, therefore, attempt to remove any of the hard core, otherwise you will become a trespasser on our client's land." Correspondence followed upon this claim by the defendant, but at the trial it was admitted on his behalf that at the material time the plaintiff was lawfully in occupation of the three and a-half acres and was the owner of the hard core and tar macadam there stacked. While the correspondence above referred to was continuing the plaintiff had agreed to sell the 4000 tons to a Mr. Edney, but in view of the claim which had been put forward and the statement by the defendant that he must be paid for the stuff, Edney withdrew, and the stuff remained undisposed of. Thereupon the plaintiff brought this action claiming a declaration that the hard core was his property, and damages for its conversion. The conversion alleged in the statement of claim was the removal by the defendant's instructions of a portion of the stuff and the letter of July 9, 1929, from the defendant's solicitors stating that the hard core belonged to the defendant and stating that if the plaintiff attempted to remove any of it he would become a trespasser. The defendant denied that there had been any conversion.

MacKinnon J. said it was not clear whether the stuff that had actually been removed was removed on the defendant's instructions, but he held that the defendant was asserting, and was in fact exercising, a physical control over the hard core, the property of the plaintiff stored on the three and a-half acres, and that he was thereby depriving the plaintiff of its possession. The defendant was therefore liable in damages for the conversion. As to damages, the defendant had interfered with the bargain the plaintiff had made by which Edney had agreed to buy it for 1*s.* 9*d.* a ton, and at this rate, on the quantity left on the plaintiff's hands, the defendant was liable in damages in the sum of 300*l.*, for which amount judgment was given.

The defendant appealed.

Bensley Wells for the appellant. The judge was wrong in holding that there had been any conversion of the hard core. The respondent was always in possession of the stuff and was never dispossessed by the appellant. It is said in Salmond on Torts, 7th ed., p. 375, that "the wrong of conversion consists in an act of wilful interference with a chattel, done without lawful justification, whereby any person entitled thereto is deprived of the use and possession of it." Here, there was no deprivation by the appellant of the respondent's chattels.

[SCRUTTON L.J. In Salmond on Torts, 7th ed., p. 394, it is said that there may be a conversion, even though the defendant has never been in physical possession of the goods, if his act has amounted to an absolute denial and repudiation of the plaintiff's right.]

That passage is based upon the decision of Darling J. in *Van Oppen* v. *Tredegars* (1), which is not binding upon this Court and is inconsistent with previous decisions of the Court of Appeal. In *Fowler* v. *Hollins* (2) in the Exchequer Chamber—the judgments in the same case in the House of Lords do not assist the present case—Brett J. said (3): "I think it may be rightly said that in no case can a man be guilty of a conversion who has not by himself or his agent had possession of the goods in dispute. A man might, I apprehend, be guilty of a conversion, though he had had possession only by his agent; as if he had authorised an agent to take goods for him, or to use or destroy them, and the agent had obeyed his commands; but if the order had been given and had not been obeyed, I apprehend that the mere order would not be a conversion. So if one enters into a contract to sell, as if they were his own, the goods of another, whether the form of contract be such as would assume to pass the property at once, or such as could only pass the property on a subsequent delivery, I apprehend that the mere fact of making such a contract is not a conversion." That passage clearly covers what in fact happened in this case. *England* v. *Cowley* (4) also supports the present contention. There the defendant intimated his intention to prevent certain goods being removed, but, save to this extent, he did not take possession of, or assume dominion over, them, and it was held that he had not converted the goods.

[SCRUTTON L.J. In *England* v. *Cowley* (4) Kelly C.B. said (5): "Apart from mere dicta, no case, so far as I am aware, can be found where a man not in possession of the property has been held liable in trover unless he has absolutely denied the plaintiff's right." Here the appellant was denying the plaintiff's right.]

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(1) (1921) 37 Times L. R. 504.

(2) (1872) L. R. 7 Q. B. 616.

(3) (1872) L. R. 7 Q. B. 627.

(4) (1873) L. R. 8 Ex. 126.

(5) (1873) L. R. 8 Ex. 126, 131.

The doctrine of conversion should not be extended to include writing a letter making a mistaken claim to dominion over goods which continued in the possession of the respondent. At the most the respondent is entitled only to a declaration that the hard core is his property and that he is entitled to have it.

[*Lancashire and Yorkshire Ry. Co.* v. *MacNicoll* (1) was also referred to.]

Marx for the respondent was not called upon.

SCRUTTON L.J. Four or five hundred years ago if a person wanted justice from the King's Court he had to obtain a particular form of writ, and, if he chose the wrong one, his claim was not maintainable whatever the facts might be. Before the Common Law Procedure Act and the Judicature Act much the same thing happened. The plaintiff had to express his claim in a way that was legally accurate, and if he did not, a demurrer put an end to the action. Great injustice was thereby done. Now, the Courts find out the facts, and, having done so, endeavour to give the right legal judgment on those facts. So in this case I begin by ascertaining the facts in order to see whether the form in which the plaintiff is claiming is substantially right, or, if not substantially right, whether any injustice is done by giving him the real remedy which the facts justify.

The facts are these: There was a Government aerodrome near the Winchester and Salisbury road, the need for which disappeared after the Armistice. The plaintiff—the present respondent—bought and undertook to clear away the structure from the land which it occupied. In consequence he became entitled to about 8000 tons of hard core and tar macadam, which he bound himself to remove and which he endeavoured to get rid of by selling. Having to remove the stuff from

(1) (1918) 88 L. J. (K. B.) 601.

where it was he had to find a place where he could put it until he could dispose of it. Accordingly he rented three and a-half acres on the opposite side of the road and there he deposited the stuff. He sold a large portion of it, but had still at the material time about 4000 tons of it left. While his tenancy of the three and a-half acres was subsisting the appellant bought the freehold of the property on which they were. For some reason I do not understand the appellant conceived the idea that he had an immediate right to occupation of the land which had been let to the plaintiff, and he conceived the idea also that the stuff on the land was his and that the respondent had no right to remove it. Mr. Bensley Wells admits that the appellant was quite wrong in taking that view: he quite misunderstood the position. What did he do? He apparently used some of the stuff himself. The respondent having heard that some one was taking the stuff and using it, went to the appellant because of what he had been told by the persons actually removing it. The appellant said that he had bought the land and all that was on it. The next thing that happened was that one Edney, who had a large contract with a railway company to deliver to it about 2000 tons of this kind of stuff, proposed to carry out his contract by buying some of the hard core from the respondent, who was ready to sell it to him. But the appellant refused to allow the stuff to be removed. His view is made clear by the letter which his solicitors wrote on July 9 in these terms: "Our client Mr. G. J. Lyster has handed us your letter to him of 5th inst. We would inform you that Mr. Lyster purchased this farm in January last, and the hard core stacked thereon of course belonged to him. . . . . You must not, therefore, attempt to remove any of the hard core, otherwise you will become a trespasser on our clients' land." The appellant was not the owner of the hard core; he was not entitled to the occupation of the land till the expiration of the respondent's tenancy; he was taking away some of the stuff, and he stopped Edney taking it away; and by his solicitors' letters he was claiming the sole right to dispose of it. These assertions of right were mistaken and

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were bad in law. But before the mistake was admitted the respondent brought this action claiming damages for the conversion of the hard core. In his solicitors' letter of June 2, 1930, he set out the grounds of his claim—namely, the removal of the hard core by the appellant's order and the claim put forward by the appellant of a right to the whole of the stuff.

Mr. Bensley Wells, while admitting that the appellant was mistaken as to his right to the hard core, contends that what was done by him was not conversion. Conversion has been very much extended in the last two hundred years. In early times the plaintiff began with a writ for trespass. That was found not to be sufficient; then came a writ on the case framed on the special circumstances, which extended the writ for trover, and all those remedies have been labelled as actions for conversion. (1) I take the modern definition of conversion from the judgment of Atkin J. in *Lancashire and Yorkshire Ry. Co.* v. *MacNicoll* (2), where he said (3): "It appears to me plain that dealing with goods in a manner inconsistent with the right of the true owner amounts to a conversion, provided that it is also established that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right." Mr. Bensley Wells argued that there can be no conversion if the defendant is not in possession of the thing alleged to have been converted, and he cited in support of that proposition *England* v. *Cowley* (4), but in that case I find Kelly C.B. saying this (5): "Apart from mere dicta, no case, so far as I am aware, can be found where a man not in possession of the property has been held liable in trover unless he has absolutely denied the plaintiff's right." In

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(1) [Under the old practice the remedies were: Trespass, for interference with actual possession; Trover, for interference with an immediate right to possess (even if trespass would also lie); Case (special action not being trover) for interference with an interest not amounting to possession or immediate title thereto.—F. P.]

(2) (1918) 88 L. J. (K. B.) 601.

(3) Ibid. 605.

(4) L. R. 8 Ex. 126.

(5) L. R. 8 Ex. 126, 131.

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this case the appellant has denied the respondent's right to remove the hard core, which he says is his own, and he backed that opinion by acts—namely, by using some of the stuff himself and by stopping the respondent and his purchaser from removing it. That brings the case within the definition of conversion given by Kelly C.B. and by Atkin J. in the cases I have referred to; and damages were rightly claimed in an action for damages. The appellant stopped the respondent from removing the hard core at a time when there was a market for it, and by his counsel he says, now that there is no market for it, "come and take the stuff away." It is said that the respondent should not be allowed to have the damages, but should only be allowed to take the hard core. I am happy to say that this contention also fails. In dismissing this appeal I think we are carrying out the modern duty of the Court to do justice irrespective of the form of the writ.

Greer L.J. I agree that the appeal should be dismissed. There can be no doubt whatever as to the merits of the case which succeeded at the trial. The respondent was entitled to deal without interference from any one with the hard core which was his property. He had agreed to sell it at a time when there was a good market for it, and by the appellant's act he has been prevented from putting its value into his pocket. In those circumstances it would afford good ground of criticism of the law which has been developed in this country during a long series of years if the respondent were without a remedy. The remedy he has chosen in this case to put on his pleading is a claim for damages for conversion, although I do not think he can be confined to his pleadings, because he has stated the facts and the Court can give the remedy which the facts justify even if he may have called it by a wrong name. I am not, however, satisfied that he called it by a wrong name. A vigorous contention was put before us to the effect that there cannot be a judgment for conversion unless it is established that the defendant has taken physical possession of the property in question, that is to say, has taken such possession as the nature of the property admits of. In this case, what the appellant did was this: he had bought the farm on which the stuff in question was lying and the only way in which he could assert his right of possession was by saying to all the world that no one should have it without his permission. That in substance is what he did. In those circumstances it is right to say that he was in possession of the stuff and was exercising control over it in derogation of the rights of the true owner. On that ground, even if Mr. Bensley Wells' contention is right, the judgment was still correct; but I am not satisfied that his contention is right, because when we consider the causes of action in their essence they do not depend so much on the assertion of rights by the defendant; they depend upon whether the defendant has interfered with rights of property and those rights include rights of possession, and if the defendant is proved to have prevented the true owner from exercising his rights it is quite clear that there is a cause of action. Whether a century or two centuries ago that action would have been called trover or an action on the case is quite immaterial. A cause of action has been proved in this case, because there was an interference by the appellant with the rights of the respondent. It may be that trover is not the right name for that, but I agree that the language used by Kelly C.B. in *England* v. *Cowley* (1) supports the view that even in a case where possession has not been taken by the defendant but all that has happened is that the defendant claims to exercise as against the plaintiff the rights of owner in respect of the goods that is sufficient to support an action for conversion. Whether that be so or not, the facts of this case disclose a cause of action which is recognized by the law of this country. The defendant said in effect by his solicitors' letter: "I am the owner of the hard core; I am in possession of it; and if you take any of it away I will treat you as a trespasser." He thereby converted the hard core to his own use and is liable to the plaintiff for its value, whether the claim is sustainable in trover or by an action on the case.

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(1) L. R. 8 Ex. 126, 131.

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SLESSER L.J. I agree. We have listened to an interesting discussion, but even on the narrowest construction for which Mr. Bensley Wells contends I think the evidence shows quite clearly that the appellant was exercising dominion over the goods inconsistent with the rights of the true owner. In the correspondence the appellant quite plainly and without any ambiguity said that he was the owner and proposed to use the hard core as he felt disposed. There could be no clearer way of asserting dominion over the goods than that. The facts are quite different from the facts in *England* v. *Cowley* (1), where the interference complained of was a statement by the landlord of the premises that the tenant's goods must not be removed. In this case there was an unqualified claim of property by Mr. Lyster and a statement that none of the stuff could be removed unless he was paid for it. That claim is only consistent with a claim by the appellant to be the owner of the goods. Interesting as is the procedural argument advanced by Mr. Bensley Wells it cannot be allowed to succeed.

Appeal dismissed.

Solicitors for appellant: *Johnson, Jecks & Colclough, for Down, Scott & Down, Dorking.*

Solicitors for respondent: *Maples, Teesdale & Co., for Cumberland Brown & Shearman, Luton.*

J. S. H.

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(1) L. R. 8 Ex. 126.

GLAMORGAN COUNTY VALUATION COMMITTEE *v.* BARRY AREA ASSESSMENT COMMITTEE.

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Rating—County Valuation Committee—Appeal by to Quarter Sessions—Notice of Appeal—Inclusion in of several Hereditaments separately rated—Validity—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *ss.* 18, 26, 31, 45.

Where the Assessment Committee has approved a valuation list, a notice of appeal from the decision of that committee to quarter sessions given by the county valuation committee established under the Rating and Valuation Act, 1925, on the ground that the assessments of several separately rated hereditaments comprised in the list are too low, is not prevented from being valid by reason of its including all these hereditaments, it being unnecessary that a separate notice of appeal should be given in respect of each of the hereditaments.

Rex v. *Sussex Justices* (1812) 15 East, 206 considered.

SPECIAL CASE stated by quarter sessions for the county of Glamorgan.

The appellants, the Glamorgan County Valuation Committee, were a committee established by the Rating and Valuation Act, 1925, and appointed by the Glamorgan County Council pursuant to s. 18 of that Act. The respondents, the Barry Area Assessment Committee, were a committee appointed under that Act whose area formed part of the county of Glamorgan, and the rating authority for the Cowbridge Rural District were the rating authority for the area in that county in which the parishes of Llandow and Colwinston are situated.

The draft valuation list for the rating area of Cowbridge Rural District which was comprised in the Barry Assessment Area contained the assessments of eight dwelling-houses in the parish of Llandow and ten dwelling-houses in the parish of Colwinston, of which the Cowbridge Rural District Council were the owners.

On January 11, 1929, the appellants, by their valuer, gave notice of objection to the assessments of these eighteen dwelling-houses, that objection being in form one notice with a schedule attached thereto in which the eighteen assessments were described. The draft valuation list was duly approved by the Barry Area Assessment Committee, and on July 31, 1929, the objection by the appellants was heard and determined by that Assessment Committee as an objection outstanding at the time when the list was approved, as provided by the Act of 1925, Fourth Schedule, Part III., r. 10. At the hearing of the objection the appellants were represented by the county valuer, who contended that the assessments objected to were too low by comparison with the assessments of similar hereditaments in the same county. The rating authority was represented by the rating officer. The Assessment Committee confirmed the assessments.

On August 19, 1929, the appellants served notice of appeal against the Assessment Committee's decision, that notice being in form the same as the notice of objection to the draft valuation list, there being one notice with a schedule attached in which the eighteen hereditaments were described.

On October 28, 1929, the appeal came on for hearing before the quarter sessions. The respondents, and also the Cowbridge Rural Council as owners, appeared separately thereto. None of the occupiers of the hereditaments appeared, though it was admitted that they had been duly served with copies of the notices of objection and appeal. Before that appeal was opened objection was taken by the respondents that the notice of appeal was bad in form.

In support of that objection it was submitted by counsel on behalf of the respondents (*a*) that an occupier or ratepayer is entitled by virtue of the express provisions of s. 45 of the Act of 1925 to include in the same appeal, under Part II. of that Act, all or any hereditaments of which he is, or is deemed to be, the occupier or ratepayer that are comprised in the valuation list, although they are separately assessed in that list, but that the appellants did not come within either of the terms "occupier" or "ratepayer," and were therefore not so entitled; and (*b*) that the notice of appeal which was not a notice of appeal by an occupier or a ratepayer included and was in respect of eighteen hereditaments, each separately assessed, and was therefore bad in law.

In answer to that objection it was contended on behalf of the appellants (*a*) that the respondent Assessment Committee had heard and determined the objection by the county valuation committee, notice of which was in form the same as the notice of appeal, and that, having so heard and determined the objection in that form, it was not open to that committee, as respondents to that appeal against their decision, to raise the objection therein referred to on the notice of appeal; (*b*) that in the practice relating to rating appeals before the Act of 1925 came into force doubt existed as to the legality of the inclusion by an occupier or a ratepayer of more than one hereditament in the same notice of appeal, and that s. 45 of that Act was an express provision to settle any such doubt and to define clearly the right of occupiers and ratepayers in that respect; (*c*) that the county valuation committee was first established by s. 18 of the Act of 1925, and was vested with rights and powers of objection and appeal by s. 18, sub-s. 3, s. 26, and s. 31 of that Act; (*d*) that that committee was not in any way concerned with and/or bound by the former practice, or any doubt which existed in regard thereto, and, though not named in s. 45 of the Act of 1925, should, in view of the duties imposed upon them by that Act, as well as the general scope and objects thereof, have the same facilities in the exercise of their rights and powers of appeal as those expressly granted to occupiers and ratepayers; and (*e*) that the notice of appeal was valid and that the appeal should be heard by quarter sessions.

The quarter sessions held that the notice of appeal was invalid, and dismissed the appeal.

The question for the Court was whether in the circumstances, and on a true construction of s. 45 of the Act of 1925, the decision of quarter sessions allowing the preliminary objection of the respondents was right in law.

Vaughan Williams K.C. (*W. C. Howe* with him) for the county valuation committee, appellants. The notice of appeal given by the appellants, the county valuation committee, was not invalid by reason of its including the eighteen separately assessed hereditaments in question.

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The appellants were entitled under the Rating and Valuation Act, 1925, to give the notice of appeal in the form in which they gave it. That Act enables a county valuation committee which takes the same objection in principle to the assessment of several separate hereditaments comprised in the same valuation list to include them all in one notice of objection or of appeal. This appears from the relevant provisions of the Act (1) rightly construed. The title of the Act declares it to be an Act to promote uniformity in the valuation of property for the purpose of rates. Sect. 18 provides (sub-s. 1) that for the purposes of the Act there shall be established in every county a county valuation committee; (sub-s. 2) that it shall be the duty of that body to take such steps as it thinks fit for promoting uniformity in valuation and assisting rating authorities and assessment committees in the performance of their functions under the Act, and for that purpose to bring its recommendations to the notice of any such body, and to appear as a party to any objection or appeal under the Act; provided that it shall not be entitled to appear in opposition to any objection or appeal by the occupier of a hereditament unless it has given him notice. Thus, that section empowers the county valuation committee to appear as a party to any objection or appeal under the Act; and only requires it to give notice in the case of an objection or appeal by the occupier of a hereditament, but even in that case not directing that it may not include several separate hereditaments in the same notice. Sect. 26 provides (sub-s. 1) that any person, including the county valuation committee, aggrieved by the incorrectness or unfairness of any matter in the draft valuation list, or by the insertion therein or omission therefrom of any matter, or otherwise with respect to the list may lodge an objection with the Assessment Committee; and (sub-s. 2) that certain provisions shall apply to the form of notices of objection and the sending of copies thereof. By virtue of the words " or otherwise " in sub-s. 1 of that section, a county valuation committee would seem to be entitled to lodge the objection in respect of several hereditaments en bloc. The appellants took exception to the valuation list on the ground that the assessments of the eighteen hereditaments in question were relatively too low, and they accordingly lodged a notice of objection under that section to the assessments of these hereditaments, having a schedule in which all the hereditaments were set forth, and of that notice copies were duly sent to the respondents and to the occupiers. It was never suggested by the respondents or at all that that notice or any of the copies of it was prevented from being valid by reason of the fact that it included all these hereditaments. Sect. 31 provides (sub-s. 1) that any person who appeared before the Assessment Committee on the consideration of an objection, may if aggrieved by the decision of that committee on the objection appeal to quarter sessions; and (sub-s. 2) that any person on whom a copy of a notice of such an appeal is required to be served may appear as respondent: Provided that (*b*) where the appellant is the county valuation committee the occupier of the hereditament to which the appeal relates may instead of appearing as respondent give notice to the Court that he desires to be called as a witness; and (sub-s. 3) that certain provisions shall have effect with respect to the giving of that notice and the service of copies thereof. The appellants being aggrieved by the decision of the Assessment Committee on their objection duly gave under that section the notice of appeal in question, which was in form the same as their notice of objection specifying the eighteen hereditaments, and of that notice copies were duly served on the respondents and the occupiers. Sub-s. 2 (*b*) of that section, relating to an appeal by the county valuation committee, contemplates a new kind of dispute between two public authorities—namely, that newly appointed committee and the Assessment Committee, and a new kind of procedure applicable to a dispute of that kind and different from the previously existing procedure applicable to individual occupiers. Under that new procedure the occupier of a hereditament to which the dispute relates has a right to be called as a witness and in that way to be present at the hearing even though he has not been made a party, and it is therefore unnecessary that he should be served with a separate notice of appeal relating to his hereditament. As the present respondents heard and determined the objection on one notice of objection for all the hereditaments, it is not open to them to require that there should be more than one notice of appeal for all the hereditaments. It is true that s. 45 provides that any occupier or ratepayer may include in the same objection, appeal or other proceeding all or any hereditaments of which he is or is deemed to be the occupier or ratepayer which are comprised in the same valuation list, although separately assessed. But that section does not imply that the Assessment Committee cannot include several hereditaments in the same notice of objection or appeal. The county valuation committee could never be the occupier or ratepayer of a hereditament and there was therefore no reason why that section should specially mention it. As that section enables an occupier or ratepayer to include several separate hereditaments in one notice of objection or of appeal, and as the Act empowers the county valuation committee to appear as a party to any such objection or appeal, it would be inconsistent with these provisions to hold that the county valuation committee could not include several separate hereditaments in one notice of objection or of appeal given by itself. It cannot be the intention of the Act that the county valuation committee should be in a less favourable position than an individual occupier or ratepayer, and it should therefore be presumed that that committee can adopt equally convenient procedure with that which this section has rendered available to the individual occupier. A further reason for supposing that the Act intended that the county valuation committee should be entitled to include several hereditaments in one notice of appeal is that unnecessary proceedings and costs would thereby be avoided.

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(1) These provisions so far as material are set out below in the judgment of Lord Hewart C.J.

According to the practice which existed before the Act of 1925 an appellant would apparently have been entitled to give a notice of appeal in the form of that here in question.

In *Rex* v. *Sussex Justices* (1), where it was held that several persons having a joint grievance in regard to the omission or underrating of several alleged ratepayers might join in giving one notice of appeal against a rate, it was not even suggested that the appellants might not include all the alleged ratepayers in the one notice of appeal. See also *Rex* v. *White*. (2) Under the Act of 1925 the county valuation committee must be taken to have rights at least equal to those which an individual ratepayer had under the old law.

[LORD HEWART C.J. referred to Ryde on Rating, 5th ed., p. 718.]

Konstam K.C. (*Stanley Evans* with him) for the Barry Assessment Committee, respondents. The notice of appeal given by the appellants was invalid inasmuch as it included all the eighteen hereditaments in question. The appellants should have given eighteen notices of appeal, each of which included only one of these hereditaments.

The practice introduced by the Rating and Valuation Act, 1925, in regard to notices of objection and appeal entirely supersedes the former practice, and the appellants were not entitled under the Act to give the notice of appeal in the form in which they gave it. The provisions of the Act show that it recognizes that ratepayers and occupiers of separate hereditaments may have different interests entitling each of them to a separate notice of objection or of appeal in respect of his own hereditament. Sect. 14 provides that no appeal against a rate shall lie to quarter sessions in respect of any matter in respect of which relief might be obtained under the Act by means of an objection to the draft list, or by means of a proposal for the amendment of the current list. In the present case it was open to the appellants to obtain under the Act any relief to which they might be entitled by means of an objection properly taken to the draft list or by a proposal for the amendment of the current list, and therefore no appeal against the rate which might formerly have lain to quarter sessions for the purpose of obtaining that relief was available to the appellants. Sect. 18, sub-s. 1, in establishing the

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(1) 15 East, 206.

(2) (1792) 4 T. R. 771.

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county valuation committee created an entirely new body. It was not intended that that new body should possess every power and right which a party to a rating case had before the passing of the Act, and the provisions of the Act do not confer upon it every such power and right. Sub-s. 3 of that section which empowers the committee to appear as a party to any objection or appeal, imposes the restriction that it shall not be entitled so to appear in opposition to any objection or appeal by "the occupier of the hereditament" unless it has given notice to "the occupier" as therein mentioned, thus apparently requiring a separate notice to be given to the occupier of each hereditament. Sect. 26 provides (sub-s. 1) that any person including the county valuation committee may lodge an objection to the draft list, and (sub-s. 3) that there shall apply to notices of objection provisions in the Fourth Schedule which require that where the objection relates to a particular hereditament a copy of the notice shall be sent to "the occupier of that hereditament." These provisions also suggest a separate notice of objection in respect of each hereditament. Sect. 31 provides (sub-s. 1) that any person aggrieved by the decision on an objection may appeal to quarter sessions, and (sub-s. 3) that there shall apply to notices of appeal provisions in the Fifth Schedule which require that where the appeal relates to a particular hereditament a copy of the notice must be served on "the occupier of that hereditament." These provisions point to a separate notice of appeal in respect of each hereditament. Sub-s. 2 (*b*) of that section speaks of "the occupier of the hereditament," and should not be construed as empowering the county valuation committee when appellant to serve on an occupier a notice of appeal or copy thereof including other hereditaments than that in which he is interested. Sect. 45 in providing that any occupier or ratepayer may include in the same objection, appeal or other proceeding all or any hereditaments of which he is or is deemed to be the occupier or ratepayer which are comprised in the same valuation list although separately assessed, provides exhaustively for all the cases in which under the

Act several hereditaments may be joined in one notice of objection or appeal. It includes any case in which the occupier or ratepayer appeals in respect of his own hereditaments. It also includes the case, formerly provided for, of an appeal by an owner deemed to be an occupier or ratepayer: *Rex* v. *Brentford Union Assessment Committee. Ex parte Herring.* (1) It does not however apply to other cases, such for example as that of an occupier appealing against the underrating of the hereditaments of other persons, and it clearly ought not to be held applicable to an appeal by the county valuation committee, to which it does not refer either expressly or by implication. The question whether or not separate appeals should be consolidated is one to be decided by the court of quarter sessions in its discretion.

Even if the appellants were entitled to avail themselves of the practice which existed before the passing of the Act of 1925, they would not have been entitled to give the notice of appeal in the form in which they gave it. The practice under the former Acts was not what the appellants represent it to have been. The case of *Rex* v. *Sussex Justices* (2) no doubt shows that several persons having a joint grievance against a rate, such as the omission from it of a person who ought to have been rated, might join in giving one notice of appeal. And apparently under the former practice an occupier of several separate hereditaments might have included them all in one notice of appeal. But there was no provision in any of the earlier Acts, nor was it ever the practice, that a person who desired to appeal against the rating of several separately assessed hereditaments could include them all in one notice of appeal.

LORD HEWART C.J. This is a special case stated for the opinion of this Court under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, by the justices of quarter sessions for the county of Glamorgan.

The point raised may be very briefly stated. The appellants, the Glamorgan County Valuation Committee, are a committee established by the Act of 1925 and appointed by the Glamorgan County Council pursuant to their powers under the statute. The respondents, the Barry Area Assessment Committee, are also appointed unde that statute, their area being part of the county of Glamorgan, and the draft valuation list for the rating area of Cowbridge rural district, which is comprised in the Barry assessment area, contains the assessments of, among others, eighteen dwelling-houses, eight in one parish and ten in another. It was desired by the present appellants to contend that the assessments were too low by comparison with other assessments, and accordingly on August 19 of last year the appellants served notice of appeal, having previously made an objection which was determined against them by the Assessment Committee. The objection and the notice of appeal related to the eighteen hereditaments, and those eighteen hereditaments were specified and described in a schedule. That appeal came before the court of quarter sessions, and there it was urged on the part of the present respondents, the Assessment Committee, that the notice of appeal was bad because it included and was in respect of eighteen hereditaments each separately assessed. The appellants contended that the notice of appeal was valid and ought to be heard. The court of quarter sessions decided that the notice of appeal was bad, and the question for this Court is whether or not, in so deciding, they came to a correct decision in law.

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(1) (1907) 71 J. P. 281.

(2) 15 East, 206.

It is to be observed that the only ground upon which exception was taken to that notice of appeal—a document which might have been, but is not, annexed to this case stated—was that it had to do with eighteen several hereditaments each separately assessed; and the short point is whether or not the county valuation committee could proceed upon a notice of objection or a consequential notice of appeal including and relating to eighteen hereditaments each separately assessed. In the Court below some stress was no doubt laid upon s. 45 of the Act of 1925, but that section seems to me to have little to do with the case, and no stress has been laid upon its provisions by the appellants in this Court.

It is important to consider the position of this county valuation committee. The committee was enabled to come into existence only by the provisions of the recent Act of 1925, which I have mentioned. Sect. 18, sub-s. 1, of the Act provides that "there shall be established in every county a committee of the county council" constituted as therein described. Sub-s. 2 of that section expressly provides: "It shall be the duty of every County Valuation Committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation. . . ." Indeed this Act itself is described in its title as: "An Act . . . . to promote uniformity in the valuation of property for the purpose of rates." Sub-s. 3 of s. 18 provides: "A County Valuation Committee may . . . . appear as a party to any objection or appeal under this Part of this Act." In s. 26 there is this provision: "Any person (including the county valuation committee and any local authority) aggrieved by the incorrectness or unfairness of any matter in the draft list, or by the insertion therein or omission therefrom of any matter, or by the valuation as a single hereditament of a building or a portion of a building occupied in parts, or otherwise with respect to the list, may in accordance with the provisions of this Part of this Act lodge an objection . . . ."; and the section makes certain provisions in Part II. of the Fourth Schedule to the Act applicable to notices of objection. Then s. 31 provides with reference to an appeal to quarter sessions: "Any person who appeared before the assessment committee on the consideration of an objection made before the committee under this Part of this Act may, if he is aggrieved by the decision of the committee on the objection, appeal against the decision . . . ."; and that section makes certain provisions in Part I. of the Fifth Schedule to the Act applicable to notices of appeal. Just as by the said provisions of the Fourth Schedule a copy of the notice of objection is to be served by the Assessment Committee, where the objection relates to a particular hereditament, on the occupier of that hereditament; so by the said provisions of the Fifth Schedule, in the case of an appeal to quarter sessions, the appellant himself must, within a time stated, serve a copy of the notice of appeal not only upon the rating authority, but, where the appeal relates to a particular hereditament, upon the occupier. It is common ground that in this case those steps were observed. The result, therefore, was that the occupier of each of these eighteen hereditaments received notice of the objection and of the appeal.

What was the position of an occupier after receipt of those notices? By s. 31, sub-s. 2, it is provided: "Any person on whom a copy of a notice of an appeal to a court of quarter sessions under this Part of this Act is required to be served may, if he thinks fit, appear as respondent to the appeal." Every one, therefore, of those eighteen occupiers might, if he had been so minded, have appeared as a respondent to the appeal; but, short of that, he might, alternatively, have availed himself of the new and significant enactment in s. 31, sub-s. 2 (*b*), which makes a special and beneficial provision as follows: "Where the appellant is the county valuation committee or a local authority, the occupier of the hereditament to which the appeal relates may at any time before the hearing of the appeal instead of appearing as respondent give notice to the court that he desires to be called as a witness in the case, and if he gives such a notice shall, unless called as a witness by any party to the appeal be called by the court as a witness. . . . ." In the result, therefore, every one of these occupiers had notice of what was being done, had notice that he might be affected, had notice that the allegation was that in his case the rates were too low, and had the choice either of appearing as a respondent to the appeal or of giving notice that he desired to be called as a witness.

But it is said that nevertheless these proceedings were wrong, because there ought not to have been one appeal in respect of all the eighteen hereditaments with notice of that appeal to the persons interested, but that there ought to have been eighteen separate appeals, one in respect of each of the hereditaments. It seems to be common ground that if there had been eighteen appeals, the individual occupier would have been in no better position than that in which he now stands either as regards ability to appear as a respondent or as regards his competence to give evidence. There would, no doubt, have been a great multiplication of documents, a great multiplication of appeals, and possibly a great multiplication of costs.

What is the proper way of bringing an appeal of this kind to the notice of the persons who would be affected by it? From the case of *Rex* v. *Sussex Justices* (1) it appears that there several parties having a joint grievance had joined in giving one notice of appeal to the parish officers. It was said that notices of appeal should have been given separately by each appellant and not one joint notice, and that objection was overruled. But it does not seem to have been there suggested that where there are various persons affected, there must be a separate appeal with reference to each. It is quite easy to understand why no such point was taken, because s. 6 of the Poor Rate Act, 1801, provides that: "from and after the passing of this Act, if any person or persons shall appeal against any rate or assessment made for the relief of the poor, because any other person or persons is or are rated or assessed in such rate or assessment, or is or are omitted to be rated or assessed therein, or because any other person or persons is or are rated or assessed in any such rate or assessment at any greater or less sum or sums of money than the sum or sums at which he, she, or they ought to be rated or assessed therein, or for any other cause that may require any alteration to be made in such rate or assessment with respect to any other person or persons, then and in every such case the person or persons so appealing . . . . shall give such notice of appeal, in writing as hereinbefore mentioned, not only to the churchwardens or overseers of the poor, or any two or more of them, but also to the other person or persons so interested or concerned in the event of such appeal as aforesaid; . . . ." Sect. 7 provides: that "if upon the hearing of any appeal from or against any rate or assessment, the said

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(1) 15 East, 206.

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court shall order the name or names of any person or persons to be inserted therein, and him, her, or them to be rated or assessed at any sum or sums of money, or shall order the sum or sums at which any person or persons is or are therein rated or assessed to be raised or increased," then the rate is to be recovered in the same manner as if those persons had been originally rated and assessed at such sum or sums of money. In other words, it was common form, if a person thought that it was in his interest to do it, to bring various persons before the tribunal in order to allege, for example, that they were rated at too low a figure, and in such a case there was one appeal with notice to the persons affected. I cannot see anything in this Act of 1925 which puts the county valuation committee, so far as that kind of problem is concerned, in a position less advantageous than the position of an individual occupier or ratepayer. On the contrary one would naturally expect that that committee, having the duties which it has under this Act, would be protected against unnecessary procedure in that manner. It is said that by s. 45 of the Act of 1925, certain powers in this behalf are expressly preserved to, or perhaps a more accurate expression would be, conferred upon, the occupier or ratepayer. The section provides that: "Any occupier or ratepayer may include in the same objection, appeal or other proceeding under this Part of this Act all or any hereditaments of which he is or is deemed to be the occupier or ratepayer which are comprised in the same valuation list, although they are separately assessed in that list." If I follow the argument which has been advanced, it is that if this Act had intended to preserve for the county valuation committee such a power as that which is contemplated in s. 6 of the Act of 1801, it would have said so. Why should it have said so? There has been no repeal, so far as the newly appointed county valuation committee is concerned, of the Act of 1801.

I, therefore, think that this notice of appeal, attacked as it is in one respect and one respect only, was in that respect good, that this objection fails, and that this appeal ought to be allowed.

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TALBOT J. I am of the same opinion, and for the same reasons.

I cannot but think that the quarter sessions were misled by s. 45 of the Rating and Valuation Act, 1925. It seems to me to be quite clear that whatever privileges Parliament did confer by that section, they cannot possibly have intended to alter the scope of the appeal which ratepayers had before that Act, and which the valuation committee has under the Act, with regard to the under-assessment of particular hereditaments. No doubt appeals of that kind, for reasons which are tolerably obvious, were more frequent formerly than they are nowadays and my Lord has pointed out that by the Poor Rate Act, 1801, the right was given to complain of the insufficient assessment, amongst other things, of a number of persons in any rate, and to include them all in one appeal. The language of that Act is quite clear on that point; and accordingly we find that in the case of *Rex* v. *Sussex Justices* (1)—a case which, in my opinion, removed any doubt as to the right of several appellants to join in one appeal—and also in the passage quoted from Ryde on Rating, 5th ed., p. 718, it is assumed as a matter free from question that in an appeal of this kind the case of several hereditaments alleged to be under-assessed could be raised. There is no indication in the Act of 1925 of any intention of Parliament to interfere with that view of the law, and indeed, as I ventured to say during the argument, when the Act has set up a new body in order to assist in securing uniformity in rating, that body having, therefore, not only a public interest but a public duty to take proceedings of this kind, which it is hardly ever worth the pecuniary outlay for an individual ratepayer to undertake, it would be surprising if the Act provided that that body, in seeking to produce uniformity over an area which might be tolerably wide, instead of being able to proceed by one appeal, was obliged to bring as many appeals as the number of the hereditaments of whose assessment it was complaining.

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(1) 15 East, 206.

WRIGHT J. I agree.

I do not see how it is possible to secure the purpose for which the county valuation committee is formed—namely, that of securing uniformity in valuation and assessment, otherwise than by comparison of a number of hereditaments, which must take place in one proceeding. No doubt justice requires that occupiers of these hereditaments should receive due notice and should have an opportunity of taking part in that proceeding. That is secured for them by the provisions of s. 31, sub-s. 2 (*b*), of the Act, and also by the provisions of the Fifth Schedule. The joint effect of those provisions is that each occupier of each hereditament must receive due notice of the proceeding, and having received that notice, is given the option either of appearing as a respondent to the appeal—that is to say, the one appeal in the whole matter—or of appearing not as respondent but in order to be called as witness. That being so, the suggestion that in this case there should be not one appeal but eighteen appeals, appears to be not only cumbersome and unnecessary, but also illogical. I agree, therefore, that the objection is bad and that the question raised by the case ought to be answered in that sense.

LORD HEWART C.J. The appeal will be allowed with costs, the order of the court of quarter sessions dismissing the appeal will be quashed, and the matter will be remitted to quarter sessions to hear and determine according to law.

Appeal allowed. Case remitted.

Solicitors for appellants: *Torr & Co., for D. J. Parry, Cardiff.*

Solicitors for respondents: *Elfyn David & Hamblen, Cardiff.*

J. R.

SLINGSBY AND OTHERS *v.* WESTMINSTER BANK, LIMITED.

1930
July 17;
Oct. 14.

[1930. S. 2412.]

Banker—Dividend Warrant—Warrant for Interest on War Stock—Crossed and marked "Not negotiable"—Cheque—Bill of Exchange—Promissory Note—Receipt of Payment therefor by Bank for Customer with no Title thereto—Liability of Banker—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 3, 5, 73, 82, 95—*Revenue Act*, 1883 (46 *&* 47 *Vict. c.* 55), *s.* 17.

A warrant in the usual printed form of the Bank of England for the payment of a half-year's interest on 5 per cent. War Stock, 1929–47, was crossed "& Co. Not negotiable" and contained a direction signed by the chief accountant of the Bank of England to the cashiers of the Bank of England to pay a specified sum to the order of a named person:—

Held, that it was a crossed cheque within the meaning of s. 82 of the Bills of Exchange Act of 1882, so that a banker, who in good faith and without negligence received payment of the warrant for a customer, when the customer had no title thereto, incurred no liability to the true owner of the warrant by reason only of having received payment.

Held, further, that it was a warrant for the payment of a dividend, and therefore by s. 95 of the Act of 1882 the provisions of that Act as to crossed cheques, including s. 82, applied to that warrant.

ACTION tried before Finlay J. at the Manchester Assizes.

The statement of claim was as follows:—

1. The plaintiffs were the executors of the will of Harry Turner, late of Oxford Road, Macclesfield, in the county of Chester, deceased, and as such executors were in the month of December, 1929, the holders of 10,000*l.* 5*l.* per cent. War Stock, 1929–1947.

2. On or about December 2, 1929, the plaintiff, Mary Edith Slingsby, received a warrant for 250*l.* being half a year's interest due December 1, 1929, on the said War Stock, such warrant being in the usual printed form of the Bank of England, crossed "& Co. Not negotiable," and containing a direction to the cashiers of the Bank of England to pay "to the Order of Mary Edith Stingsby (*sic*) a/c Harry Turner dec., of Oxford Road, two hundred and fifty pounds," and a

direction to the payee to sign where indicated on the face of the warrant. On or about the said December 2, 1929, the said Mary Edith Slingsby having duly signed the said warrant handed the same by her son to one John Bennett, a cashier and managing clerk in the firm of Cumberbirch & Potts of Westminster Bank Chambers, Macclesfield, aforesaid, who were then acting as solicitors of the plaintiffs in respect of the estate of the said Harry Turner, deceased.

3. In the month of January, 1930, James Cumberbirch, a member of the said firm of Cumberbirch & Potts, unlawfully and without the knowledge and authority of the plaintiffs or any of them handed the said warrant to the defendants or their agents at the Macclesfield branch of the defendants with the request that the amount thereof should be credited to the private account of the said James Cumberbirch at the defendants' said branch. The defendants in due course received payment from the Bank of England of the proceeds of the said warrant and paid or credited the same to the private account of the said James Cumberbirch.

4. In the circumstances before mentioned the defendants acted negligently and in breach of their duty to the plaintiffs in receiving the said warrant and collecting the proceeds as aforesaid without any or any due and sufficient inquiry and precaution.

5. Further or in the alternative the acts of the defendants in the circumstances aforesaid amounted to a wrongful conversion of the said warrant or the proceeds thereof against the plaintiffs.

The plaintiffs claimed: (1.) The sum of 250*l.* being the amount of the proceeds of the said warrant as money had and received by the defendants to the use of the plaintiffs. (2.) Damages for the wrongful conversion by the defendants of the said warrant or the proceeds thereof. (3.) Damages in respect of the negligence of the defendants in paying or crediting the proceeds of the said warrant otherwise than to the persons properly thereto entitled.

The defendants, the Westminster Bank, Ld., by their defence in para. 2 admitted para. 2 of the statement of claim.

3. Save as to the alleged unlawful conduct, want of knowledge and want of authority, which were denied, every allegation in para. 3 of the statement of claim was admitted.

4. Some few days before the day on which the defendants received the said warrant the manager of their Macclesfield branch, Mr. Godwin, had been informed by the said James Cumberbirch orally that he had made advances of money to his said firm's client Mrs. Slingsby. On the day and occasion when the defendants received the said warrant Mr. Godwin asked the said James Cumberbirch why he was proposing to pay the said warrant into his own account and was told by the said James Cumberbirch that he, James Cumberbirch, had previously lent 250*l.* to the said Mary Edith Slingsby and had received from that lady a promise, since duly performed, to repay the loan by her handing over to him the said warrant upon her receipt thereof. The said James Cumberbirch further stated to Mr. Godwin that Mrs. Slingsby had not drawn a cheque upon her own banking account whereby to repay the money lent by him because she did not wish it to appear or be evident that she had borrowed money from him. The said James Cumberbirch was the senior partner of the said firm, who were solicitors of good repute practising in Macclesfield, and the said James Cumberbirch was himself a person of good repute and established position.

5. The said James Cumberbirch was at all material times a customer of the defendants at their said branch. The said payment was received by the defendants on behalf of their customer in good faith and without negligence.

6. There was no negligence nor breach of duty nor conversion by the defendants as alleged or at all.

7. Further and alternatively the plaintiffs by the said Mary Edith Slingsby were themselves negligent in giving the warrant duly signed into the custody of the said John Bennett, and/or the said firm, and/or the said James Cumberbirch, and such negligence caused or contributed to their damage.

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8. The defendants would if necessary rely upon ss. 82 and/or 95 of the Bills of Exchange Act, 1882 (1), and/or upon s. 17 of the Revenue Act, 1883 (2), and/or upon s. 1 of the Bills of Exchange (Crossed Cheques) Act, 1906 (3).

8A. Further and alternatively the defendants said that on or about January 16, 1930, they became holders in due course of the said warrant which was a negotiable instrument duly indorsed by the payee thereof, by receiving it in good faith from the said James Cumberbirch and by crediting his account with 250*l.* in respect thereof before receiving payment of the warrant from the Bank of England.

9. Save as herein expressly admitted each and every allegation in the statement of claim was denied.

On January 1, 1930, the account which James Cumberbirch had with the defendants' Macclesfield branch was overdrawn to the extent of 1708*l.*, and Mr. Cumberbirch had an interview on that day with Mr. Godwin, the manager of the Macclesfield branch of the defendant bank, the effect of which was set out in a memo. made shortly after the interview by Mr. Godwin, and which was as follows: "Mr. Cumberbirch saw me with reference to cheques of his presented for payment through the clearing for 1000*l.* and 280*l.*, he had overlooked the fact that it was New Year's day and that the banks closed at

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(1) Bills of Exchange Act, 1882, s. 82 (which is in Part III. of the Act, under the heading *Crossed Cheques*): "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Sect. 95: "The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend."

(2) Revenue Act, 1883, s. 17: "Sects. 76 to 82, both inclusive, of the Bills of Exchange Act, 1882, ... shall extend to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque."

(3) Bills of Exchange (Crossed Cheques) Act, 1906, s. 1: "A banker receives payment of a crossed cheque for a customer within the meaning of s. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

11 o'clock. He stated that he had sold the 2000 1*l.* ordinary Palatine Industrial Finance Shares to a friend of his, Mr. J. Pickford, of Macclesfield, for 1500*l.* and that he would receive payment in a few days. His present holding in the company was some 14,000 shares.

" His firm had just completed a very successful year and the profits were over 4000*l.* He paid into his account his firm's cheque for 1500*l.* and stated that, against the deposit of further security, he might require temporary overdraft accommodation for 3000*l.* He had advanced money to various clients—Mrs. Slingsby owed him 250*l.* which he had lent her over Xmas pending receipt of dividends due under her late father's will (she received 1000*l.* per annum clear), some delay had arisen in connection with the settlement of her affairs. William Graty of Wilmslow, owed him 1000*l.* on mortgage and this would either be entirely repaid or 350*l.* paid in and a fresh mortgage of 650*l.* taken which would be deposited as security.

" After some discussion it was agreed to leave matters in abeyance, pending receipt of Pickford's cheque for 1500*l.* and to see what arrangements were come to regarding Graty's mortgage and other payments due."

On January 16, 1930, Cumberbirch went again to the bank and filled in a paying-in slip and paid in to the credit of his own account the warrant for 250*l.* Endorsed on the back of the paying-in slip were the words "Div-. on 10,000*l.* War Stock payable to M. E. Slingsby a/c Harry Turner, dec$^{\underline{d}}$." The cashier to whom Cumberbirch handed the warrant and paying-in slip took the warrant to Mr. Godwin, the manager, who had an interview with Cumberbirch. Mr. Godwin said the transaction was an unusual one and asked for an explanation. Having received Mr. Cumberbirch's answer Mr. Godwin made the following note on the back of the paying-in slip: " Mr. Cumberbirch stated that in anticipation of this payment he had advanced this sum to Mrs. M. E. Slingsby, and Mrs. Slingsby had signed this d./wt. [dividend warrant] and handed it to him in repay$^{\underline{t}}$ of the loan. See M/I. [memorandum of interview] of 1-1-30."

Both parties concurred in the view that Cumberbirch had in fact misappropriated the warrant, and the case was argued on that footing.

A question having arisen at the trial as to the power under which the *5l.* per cent. War Loan 1929–47 was issued, at the request of the judge application was made by the solicitors of both parties to the Bank of England for information upon that subject. The reply of the deputy chief accountant dated July 21, 1930, was as follows: "I have to acknowledge the receipt of your letter of the 18th inst., and to enclose herewith a copy of the Prospectus dated the 11th January, 1917, inviting subscriptions to the *5l* per cent. War Loan 1929–47. The stock was created under the Warrant of two of the Lords Commissioners of His Majesty's Treasury dated the 17th April 1917 made in virtue of the powers conferred upon them under sect. 1 (1.) of the War Loan Act, 1916.

"By sect. 37 (4.) of the Finance Act, 1917, which reads as follows, it is provided that stock issued under the War Loan Acts, 1914–1916, shall be subject to the provisions of the National Debt Act, 1870. 'It is hereby declared that stock or registered bonds issued under the War Loan Acts, 1914 to 1916, and any other Act authorising the raising of any sum for the purposes of the present war, shall be transferable in like manner as other stock to which the National Debt Act, 1870, applies and shall be subject to the provisions of that Act and any enactment amending that Act, so far as is consistent with the tenor of the Act under which the loan is raised and save as is otherwise provided by any other Act.'

"As you are no doubt aware, the expression 'dividends' is used throughout this Act."

The Prospectus provided for the "Issue of *5l.* per cent. War Loan, 1929–47, in Stock or Bonds," and contained the following extracts.

"Interest payable 1st June and 1st December.

"First dividend as follows, payable 1st June, 1917.

"Both capital and interest will be a charge on the Consolidated Fund of the United Kingdom.

"As soon as the necessary statutory authority has been obtained, arrangements will be made for the acceptance by the Commissioners of Inland Revenue of Stock and Bonds of these Loans at their respective issue prices, with due allowance for any unpaid interest accrued thereon, in satisfaction of amounts due on account of death duties. . . ."

"Dividends on inscribed and registered stock of the 5*l.* % War Loan, 1929–47, will be paid without deduction of Income Tax. . . ."

"Stock and Bonds of these Loans and the Dividends payable from time to time in respect thereof, will be exempt from all British taxation, present or future, if it is shewn in the manner directed by the Treasury that they are in the beneficial occupation of a person who is neither domiciled nor ordinarily resident in the United Kingdom of Great Britain and Ireland. . . ."

"The Books of the Loans will be kept at the Bank of England and at the Bank of Ireland. Dividends on Stock will be paid by Warrant which will be sent by post; dividends on Bonds will be paid by Coupon."

A further request was made to the Bank of England for evidence explaining "under what authority the Chief Accountant signed a warrant. Did he in fact sign as representative of the Treasury, or in what other capacity?" The reply of the Bank of England was as follows: "The Chief Accountant of the Bank of England acts under the authority of Part. III. of the National Debt Act, 1870, with which must be read s. 4 of the National Debt Act, 1889, incorporated therewith. In accordance with the provisions of that section the regulations for the payment of dividend and the form of dividend warrant proposed by the Bank were submitted to the Treasury for approval in December, 1908, and received that approval by letter from the Treasury in that month. The form of dividend warrant so approved is that now in use by the Bank save for small and quite immaterial alterations. It will be observed on reference to Part III. of the National Debt Act, 1870, ss. 14, 15 and 16, that the Chief Cashier of the Bank is the person designated by the Act as the recipient of the funds made available by the Treasury for the service of the debt upon which funds by the form of dividend warrants the Chief Accountant is made to draw. The Accountant General (or Chief Accountant—see s. 3) is the person designated by the Act to perform the duties mentioned in sects. 16 and 22."

With regard to the application of the terms " dividend " and " dividend warrants " to interest payments the Bank of England referred generally to the National Debt Act, 1870, the National Debt Act, 1889, the Dividends and Stock Act, 1869, and the Crossed Cheques Act, 1876.

" Regulations for the Payment of Dividends
(Pursuant to sect. 4 (1.) of the National Debt Act, 1889).

" In the absence of special instructions, Dividend Warrants will be sent by post.

(*a*) To the first stockholder, executor, or administrator, in a joint account.

(*b*) To the sole stockholder, a sole surviving stockholder, a sole executor or administrator, a sole surviving executor or administrator

at his registered address in the Bank books. . . . ."

The Regulations throughout speak of " dividend warrants."

This information obtained from the Bank of England was sent to Finlay J. on July 28, and August 29, 1930, after the conclusion of the trial.

Laski K.C. and *C. Gandy* for the plaintiffs. This dividend warrant for 250*l.* is not a cheque, and therefore the defendant bank does not come within the protection afforded to collecting bankers by s. 82 of the Bills of Exchange Act, 1882. Sect. 73 of that Act defines " a cheque " as " a bill of exchange drawn on a banker payable on demand." Sect. 17 of the Revenue Act, 1883, extends the provisions as to crossed cheques, ss. 76 to 82 inclusive, of the Act of 1882, to " any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque."

A cheque connotes a banker and a customer. This document cannot be a cheque, because it is not addressed by a customer to a bank in respect of his account at the bank; it is an order by a chief official of the Bank of England to other officials of the same bank to pay to the order of Mary Edith Slingsby: see *Allen* v. *Sea Fire and Life Assurance Co.* (1) It was held in *London City and Midland Bank* v. *Gordon* (2) that drafts drawn by one branch of a bank upon another branch or the head office of the same bank are not cheques or bills, and that the bank, which was both drawer and drawee of those instruments, was not entitled to treat them as bills of exchange within s. 3 of the Bills of Exchange Act. By a parity of reasoning a cheque drawn by an official of a bank upon his own bank equally cannot be regarded as a cheque or a bill of exchange. Further, the insertion of the words "not negotiable" prevents the document from being a negotiable instrument. Even if it were a cheque a person taking it with those words on it, by s. 81 could not have and could not be capable of giving a better title to the cheque than that which the person from whom he took it had. By the insertion of those words on a document it ceases to have the indicia and qualities of a negotiable instrument, and therefore Cumberbirch could not give a title to the warrant to the defendant bank. In the next place this document is not a dividend warrant, but is a warrant for interest due, and therefore s. 95 of the Bills of Exchange Act, 1882, does not apply. Sect. 97, sub-s. 3, provides that "nothing in this Act or in any repeal effected thereby shall affect . . . . (*d*) the validity of any usage relating to dividend warrants, or the indorsements thereof." The two sections must refer to one class of documents, and they cannot include an interest warrant. A "dividend" means a share of the net profits of an undertaking which are divided among the shareholders in proportion to their holdings, and it is variable in amount. "Interest" on the other hand is a periodical payment of money at a fixed rate in consideration of a loan or forbearance to enforce payment of a debt. This document, although

(1) (1850) 9 C. B. 574. (2) [1903] A. C. 240.

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headed " Dividend warrant 5 per cent. War Stock, 1929–1947," expressly states that the payment is in respect of " half year's interest at 5 per cent.," and therefore is not in respect of dividend : see Paget on Banking, 4th ed., p. 137. Lastly, the bank manager was negligent, because he did not make further inquiries than to put certain questions to Mr. Cumberbirch, who was paying the warrant into his own account. The bank manager knew that the warrant was in respect of a trust estate, and that it would be sent to the stockholder on December 1, and that therefore when it was paid in by Cumberbirch on January 16 the explanation that Cumberbirch gave on that day, coupled with what he had previously said at his interview with the bank manager on January 1, did not accord with the facts.

A. T. Miller K.C. and *B. B. Stenham* for the defendants. The defendants are protected by ss. 82 and 95 of the Bills of Exchange Act, 1882. The contention that s. 95 does not apply, because this warrant for the payment of interest upon 5 per cent. War Stock is not " a warrant for payment of dividend " within that section, is not a sound one. That section took the place in the Act of 1882 of s. 3 of the Crossed Cheques Act, 1876, which section included in the definition of "cheque" "a warrant for the payment of dividend on stock sent by post by the Governor and Company of the Bank of England or of Ireland, under the authority of any Act of Parliament for the time being in force." That section was intended to give the protection of the Crossed Cheques Act to a warrant such as the one in question. The Act of 1882 extends the previously limited protection given by the Crossed Cheques Act, 1876, to all dividend warrants. The view adopted in Paget on Banking that a dividend is the share of some profit earned by a company divided among the shareholders, and nothing more, is erroneous. In its true meaning the word " dividend " is applicable to anything divided up into parts and distributed to many owners, and the word is used in the Acts of 1876 and 1882 in that sense. Every holder of War Stock is entitled to the appropriate amount of the sum allocated for the service of the loan in proportion to his holding, and that amount is always described as a dividend. Dividend warrants are invariably crossed in practice, and it would be contrary to that practice if the provisions of the Bills of Exchange Act as to crossed cheques were held not to apply, because this is not a division of a company's profits. The words "payment of dividend on stock" in s. 3 of the Act of 1876 would clearly have covered this case. It cannot be suggested that the Act of 1882 by the use of a slightly different phrase has taken away the protection which the Act of 1876 had given. Unless the word "dividend" has the wider meaning contended for the Act of 1876 would have been inoperative. The contention that a warrant for interest on War Stock is a dividend warrant within the meaning of the Act of 1882 is supported by s. 4, sub-ss. 1 and 6, of the National Debt Act, 1889, which provide that "the Banks of England and Ireland respectively may from time to time, with the concurrence of the Treasury, make regulations for the payment of dividends on stock either by sending warrants through the post, or by payment through a banker, or by payment at a country branch," and also that "this section shall apply to all stock of any company or corporation, funds or annuities, transferable in the books of the Bank of England or of Ireland." This document is a bill of exchange, because it satisfies all the requirements of the definition of a bill of exchange contained in s. 3, sub-s. 1, of the Act of 1882. It is in form a cheque, because it is drawn on a banker payable on demand; it is also crossed and bears the indorsement, "Not negotiable," which words are only appropriate for use on a cheque, and therefore the defendant bank are entitled to the protection given by s. 82, as they received payment for the cheque in good faith and without negligence. If the document is not a cheque it may, under s. 5, sub-s. 2, be treated as a promissory note, in which case the crossing and the words "Not negotiable" may be disregarded as having no operation in law. If it is a promissory note it is a negotiable instrument. The defendant bank gave value for it by crediting the amount to the account of their customer. They thus became holders in due course, and as such presented it to the Bank of England and obtained the money. The bank have not been guilty of negligence, because the bank manager at Macclesfield made inquiries from a reputable solicitor who was in the best position to know the true facts, and it cannot be said that the manager was negligent because he was satisfied with the answers that he received from Mr. Cumberbirch.

Laski K.C. in reply. The definition of a cheque in s. 73 of the Bills of Exchange Act, 1882, omits the words "and includes a warrant for payment of dividend on stock," which are in the definition of a cheque in s. 3 of the Crossed Cheques Act, 1876. Those words cannot be transferred into the Act of 1882, which is a codifying Act and repeals the earlier Act. The word "dividend" is used in s. 95 of the Act of 1882 in the sense that each shareholder has the right to receive his aliquot portion of the profits of the undertaking and is not used in the sense of something to be divided, and consequently this warrant for the payment of the half year's interest does not come within the category of "dividend," and therefore the defendant bank cannot rely upon s. 82 as a protection.

Cur. adv. vult.

Oct. 14. FINLAY J. read the following judgment: In this case the plaintiffs, executors of Harry Turner, deceased, sued the defendant bank to recover 250*l.*, the amount of a Bank of England warrant for that amount. The claim is put in various ways: money had and received, damages for conversion of the warrant or the proceeds thereof, damages for negligence.

The facts were scarcely at all in dispute, and the amount at stake is not very large, but the case raises more than one point of some interest and difficulty. The plaintiffs were the executors of the deceased, who left a very substantial estate, much of it devoted to charity. The first plaintiff was the daughter of the testator and a considerable beneficiary under his will. On December 2, 1929, the plaintiff, Mrs. Slingsby, received the warrant sued on. The warrant was produced before me. It is in the usual form of the Bank of England, crossed "& Co. Not negotiable." Mrs. Slingsby signed the warrant and gave it to her son to take to Mr. Bennett, the managing clerk of Messrs. Cumberbirch & Potts, who lived in the same road as she did. Messrs. Cumberbirch & Potts were solicitors in practice at Macclesfield, and Mr. Cumberbirch, who then bore a high reputation, was the solicitor of the executors. It had been previously arranged by the executors that any warrants, etc., received by Mrs. Slingsby should be handed to Mr. Cumberbirch for attention, and it was pursuant to this arrangement that this warrant was sent to Mr. Bennett. Mr. Bennett, having received it, took it to the office and handed it to Mr. Cumberbirch. Mr. Cumberbirch had an account with the defendants' Macclesfield branch. On January 1, 1930, this account was overdrawn to a substantial amount. The precise position of the account is seen from the entries in the pass book. On January 1 there was an interview between Mr. Cumberbirch and Mr. Godwin, the manager of the Macclesfield branch of the defendants' bank. I find, and indeed it was little disputed, that the effect of what then took place is accurately set out in the memo. made shortly after the interview by Mr. Godwin. This interview is of much importance upon one of the issues I have to consider. Upon January 16 Cumberbirch again came to the bank, filled in the paying-in slip which was before me and paid in to the credit of his account the warrant for 250*l.* The cashier, Mr. Hanrahan, to whom Cumberbirch actually handed the note, observed that there was an error on its face, "Stingsby" being printed for "Slingsby," and also that the warrant was expressed to be "a/c. Harry Turner deceased." He took the warrant to Mr. Godwin, the manager, who was just about to have an interview with Cumberbirch. Mr. Godwin was examined and cross-examined in much detail as to this important interview, but what took place is clear enough and can be concisely stated. Mr. Godwin said to Cumberbirch that the transaction was unusual, and asked for an explanation. Cumberbirch referred to his conversation of January 1 and said that this payment had reference to the matter then discussed. Mr. Godwin then asked if it would not have been more desirable if Mrs. Slingsby had given her own cheque in the usual way. To this Cumberbirch replied that she had preferred to hand over the warrant, because to have given her own cheque would have made it evident that she was probably receiving accommodation from her solicitors. Mr. Godwin having asked those questions and received those answers was satisfied and he made the note which now appears on the paying-in slip. The amount was credited to Cumberbirch's account on January 16, and on January 17 the amount was actually paid to the bank.

It may be convenient at this stage to say (of course without prejudice to any explanation which Cumberbirch may in any other proceedings be able to give) that both sides before me concurred in the view that Cumberbirch had in fact misappropriated the warrant, and the case was argued on that footing throughout.

Mr. Cumberbirch had for many years carried on (in partnership with Mr. Potts, who still practises there) a large and leading practice as a solicitor in Macclesfield. I am satisfied that right up to the date of his disappearance shortly after January 16 he was generally respected and trusted. He was not the regular solicitor for the defendant bank, but he had from time to time acted for them. He was well known both as a prominent and trusted solicitor and also socially by Mr. Godwin, the bank manager. I am satisfied, and I find as a fact, that there was nothing in Cumberbirch's past record or in what was then known of his position to arouse any suspicion with regard to him either on January 1 or 16. On the contrary, he was on both these dates regarded by every one as a reliable and honourable solicitor of high standing and in large practice.

These are the facts, and it is upon these facts that the plaintiffs claim to recover 250*l.* from the defendant bank.

I now proceed to state and to examine the various points which arose and were argued before me.

The defence of the bank was based mainly upon s. 82 of the Bills of Exchange Act, 1882, and they claimed to be entitled to the benefit of this section upon two distinct grounds: (1.) that the warrant was a crossed cheque, (2.) that it was within s. 95 a dividend warrant.

As I have formed the view that this document is a dividend warrant within s. 95, it is not strictly speaking necessary that I should decide whether, apart from s. 95, it would fall within s. 82 as being a crossed cheque. But as a considerable argument was addressed to me upon this point and as I have formed a view on it, I may as well express it. In my opinion, this was a cheque. It seems beyond doubt to possess all the indicia of a cheque except one. It is an unconditional order drawn on a banker, payable on demand. It is crossed and bears the words "Not negotiable." But it was said that it was not a cheque because the drawer was himself an official of the bank on which the cheque was drawn. It would seem to follow from the decision of the House of Lords in *London City & Midland Bank* v. *Gordon* (1) that a draft drawn by one branch of a bank on its head office, or by an official of a bank upon his own bank, cannot be regarded as a cheque. If this is so, the judgment of Bailhache J. in *Ross* v. *London County Westminster and Parr's Bank, Ld.* (2) cannot on this point be relied on. But in what capacity was the official acting when he drew this draft? I think the true view is that he was acting as the agent of the Government. If this is so, the transaction ceases to be merely an inter-departmental one, as where a branch of a bank draws on its head office, and the substance of it is that the Government is drawing on moneys in the hands of the bank. I should explain that at the hearing in Manchester I expressed a wish for precise information as to the authority under which the Chief Accountant signed. This information was, not unnaturally, not available at short notice in a circuit town, and it was accordingly arranged that the solicitors should make inquiries of the Bank of England and place at my disposal any information which they obtained. The letters of July 28 and August 29, 1930, with their annexes are accordingly to be looked at. It seems to me that reference to the Acts of Parliament, and particularly Part III. of the National Debt

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(1) [1903] A. C. 240.

(2) [1919] 1 K. B. 678.

Act, 1870 (33 & 34 Vict. c. 71), and s. 4 of the National Debt Act, 1889 (52 Vict. c. 6), support the conclusion at which I have arrived.

But apart from that, I am of opinion, as already indicated, that this draft is within s. 95. This depends upon whether it is "a warrant for the payment of dividend" within the meaning of the section. Upon this it is necessary to consider the exact effect of the document and the sections under which the loan, in respect of which this interest or dividend was paid, was issued. The stock was issued under warrant pursuant to s. 1, sub-s. 1, of the War Loan Act, 1916 (6 & 7 Geo. 5, c. 67). By s. 37, sub-s. 4, of the Finance Act, 1917 (7 & 8 Geo. 5, c. 31), the National Debt Act, 1870, is made applicable. In that Act "dividend" is used throughout as meaning the sum payable by way of interest on Government stock. See particularly Part III. of the Act headed "Payment of dividends." In this connection, the following three Acts, Dividends and Stock Act, 1869 (32 & 33 Vict. c. 104), the National Debt Act, 1889, and the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), also require consideration.

The point is whether "dividend" in the Act of 1882 is used in the narrower sense as meaning that part of the profits of a company divisible among its shareholders, or in a broader sense as meaning that which is to be divided. I think that the broader construction is to be preferred. I arrive at this conclusion on the construction of s. 95 of the Act of 1882. Whatever doubts there might be on the construction of the section by itself, seem to me to be resolved when one looks at the legislation above referred to. That legislation I think makes it clear that "dividend" is the word used by the Legislature to signify interest on Government stock. In this connection I attach particular importance to the Act of 1876. Mr. Laski, in the course of his very skilful argument, practically admitted that he could not have maintained his position if the matter had depended upon the Act of 1876. I agree with him in this, but it certainly is startling if the Legislature in re-enacting and generalizing the law has effected so important a change as would be the exclusion of all drafts made in payment of interest on Government loans.

I therefore arrive at the conclusion that the document in question, even if it is not a cheque, falls within s. 95.

This brings me to the question, a pure question of fact, but by no means free from difficulty—namely, whether the conduct of the bank was without negligence. As to good faith, I need say nothing, for there was no suggestion of bad faith. As to negligence, the case differs from a good many that have been decided in this respect, that here inquiries were in fact made. But this does not, I think, affect the point that has to be decided. Where no inquiries are made, the question is whether a reasonably competent and careful bank official would have made inquiries. The duty has been stated in a good many cases. I may refer to *A. L. Underwood, Ld.* v. *Bank of Liverpool* (1), particularly where Scrutton L.J. says (2): "The test of the standard of duty in such cases is stated by Lord Dunedin in *Commissioners of Taxation* v. *English, Etc., Bank* (3) to be 'the ordinary practice of bankers.'" I may also refer to *Lloyds Bank* v. *Chartered Bank of India, Australia and China* (4), particularly where the present Lord Chancellor, then Sankey L.J., says (5): "I think the duty of the defendants to the true owner of the cheque was (1.) to exercise the same care and forethought with regard to the cheque paid in by the customer as a reasonable man would bring to bear on similar business of his own (see Sir John Paget on Banking, 4th ed., p. 274), and (2.) to provide a reasonable and competent staff to carry out this duty." Where inquiries are made, the question is whether a reasonably competent and careful bank official would have been satisfied with the answers he received or would have pursued the matter further. The facts are set out earlier in this judgment. It is only necessary that I should state the conclusion at which I have arrived. Upon the whole I think it is established that the bank officials were not guilty

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(1) [1924] 1 K. B. 775.
(2) Ibid. 793.
(3) [1920] A. C. 683, 689.
(4) [1929] 1 K. B. 40.
(5) [1929] 1 K. B. 69.

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Finlay J.

of any negligence. It cannot be expected, as was said in one of the cases, that bank officials should be amateur detectives. Mr. Godwin considered that the matter called for inquiry, and I think he would have been negligent if he had not. But the answers he received appeared to harmonize perfectly with the information he had previously received. It is obvious that this plot was carefully constructed and carried out by Mr. Cumberbirch. It would not, in my opinion, be right to hold that it was negligence to believe a statement made by a man then in the highest repute, consistent with the information Mr. Godwin already was in possession of and not on its face improbable.

Upon the whole, therefore, I hold that the bank are entitled to rely on s. 82, because their officials acted in good faith and without negligence, and there must be judgment for the defendant bank.

Judgment for defendants.

Solicitors for plaintiffs: *Vaudrey, Osborne & Mellor, Manchester.*

Solicitors for defendants: *Sale & Co., Manchester.*

R. F. S.

THE KING *v.* LONSDALE AND OTHERS.

C. C. A.
1930
Nov. 10.

Criminal Law—Two or more Prisoners—Habitual Criminal—Separate Trials —Prevention of Crime Act, 1908 (8 *Edw.* 7, *c.* 59), *s.* 10.

Where two or more persons are jointly charged and convicted of a crime, and each is also charged as a habitual criminal, each of them should be tried separately on the charge of being a habitual criminal.

APPEAL against conviction as habitual criminals.

The appellants, John Lonsdale, Edward Ross, and Jack Baker, pleaded guilty at the County of London Sessions in August, 1930, to a charge of breaking and entering a shop with intent to steal, and were sentenced to three years' penal servitude.

The indictment further charged them with being habitual criminals, and to this all three pleaded not guilty. The same counsel represented all three appellants upon their trial, and as he desired that they should be tried together, the chairman of the sessions acceded to this request. The evidence required by the Act was given, and the three statutory convictions were proved in each case, together with further convictions against the appellants. From this it appeared that Lonsdale had been convicted on various occasions since 1894 in the name of Edwin Thomas Baker, that Jack Baker had been convicted on previous occasions in the name of Theodore Baker, and that Ross had been convicted in the name of Devenny, together with a man called Baker. The jury convicted all three appellants, and upon this charge the acting chairman sentenced them to five years' preventive detention in accordance with the statute.

The grounds of appeal were that owing to the three appellants being tried together the case was confused, and the jury had no chance of distinguishing between them respectively.

Elam for Lonsdale. The cases of the three appellants on the charge of being habitual criminals were confused owing to the name Baker, in which both the first two appellants had been at various times convicted. Lord Alverstone C.J. said in *Rex* v. *Blake* (1): "It is scarcely possible for the circumstances of two different cases to be identical. . . . . A man on trial as a habitual criminal should be tried separately." There was confusion also in the summing up by the chairman as regards the various dates of conviction. The records of the prisoners differed and the facts varied considerably in each case. The respective records were not put clearly and separately before the jury. In *Rex* v. *Taylor and Coney* (2) Lord Alverstone C.J. is reported to have said that his remarks in *Rex* v. *Blake* (1) were only intended as obiter dicta and not as a ruling, but it is submitted that these remarks were right in principle and constitute a ruling which should be followed.

[AVORY J. From the report of *Rex* v. *Blake* (1) in Justice of the Peace Reports (1) the Lord Chief Justice appears to have said that the Court thought it well to lay down the rule that a person charged in an indictment with being a habitual criminal should be tried on that issue separately and not with any other person.]

Yes, that is stronger. The point was not dealt with in *Rex* v. *Chatway and Howard* (3), although it was raised in argument. In *Rex* v. *White and Shelton* (4) prisoners were tried separately on this charge in circumstances similar to the present. In the present case the acting chairman allowed the appellants to be tried together at their counsel's request, but he should not have done so. It was difficult to avoid confusion in the summing up, and the case for each prisoner individually was embarrassed by the joint trial.

St. John McDonald for Ross and *Wickham* for Baker adopted the same arguments.

F. D. Levy for the Crown. A certain amount of confusion may have resulted from the joint trial, but not sufficient to affect the verdict of the jury. It may be advisable that trials of two or more prisoners on this charge should be

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(1) (1910) 4 Cr. App. R. 275; 74 J. P. 336.

(2) (1910) 5 Cr. App. R. 168.

(3) (1910) 5 Cr. App. R. 151.

(4) (1927) 20 Cr. App. R. 61.

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separate, but it is not essential, so far as the existing authorities go. A definite rule is certainly desirable.

The judgment of the Court (AVORY, SWIFT and ACTON JJ.) was delivered by

AVORY J. In this case the appellants were convicted of being habitual criminals after pleading guilty to a previous charge of shop-breaking. This case is a forcible illustration of the confusion which may arise from persons being tried together upon a charge of being habitual criminals. In *Rex* v. *Blake* (1) an application for leave to appeal was made to the Court of Criminal Appeal, consisting of Lord Alverstone C.J., Bray and Lord Coleridge JJ., on similar grounds to the present appeal. That application was dismissed by the Court as being out of time, but Lord Alverstone C.J. is reported to have said in delivering the judgment of the Court: "The Court have a difficulty in conceiving a case in which two men alleged to be habitual criminals ought to be tried together. The question whether a man is a habitual criminal or not must depend on his past life, and what he has done since his last release, and it is scarcely possible for the circumstances of two different cases to be identical. It is therefore, as a question of practice, an important matter that a man on trial as a habitual criminal should be tried separately."

In *Rex* v. *Taylor and Coney* (2), when this passage from *Rex* v. *Blake* (1) was cited, the Lord Chief Justice is reported to have said in the course of the hearing: "I do not think I intended that as a ruling. It is advisable that prisoners should be tried separately to prevent confusion in the minds of the jury. It was rather an obiter dictum than a ruling." Possibly the Court was not referred to the report of *Rex* v. *Blake* in the Justice of the Peace Reports (1), in which Lord Alverstone C.J. is reported to have said in delivering judgment that the Court could not conceive any case where two persons could properly be tried together upon a charge of being habitual criminals. They therefore thought it well to lay down the rule that a person charged in an indictment with being a habitual criminal, when tried on that issue, should be tried separately, and not with any other person.

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(1) 4 Cr. App. R. 275; 74 J. P. 336.

(2) 5 Cr. App. R. 168, 169.

In *Rex* v. *Taylor and Coney* (1) Lord Darling (then Darling J.) said, in the course of the hearing: "If it could be shewn that there had been any confusion this Court might interfere"; and Lawrance J.: "There is no doubt it is better that prisoners should be tried separately on a charge of being habitual criminals." Upon that state of the authorities, when the appellants asked to be tried together, it is not surprising that the acting chairman (notwithstanding a proper protest by Mr. Levy as counsel for the Crown) was induced to accede to the request of the appellants' counsel for a joint trial. No doubt he believed that counsel for the defence thought it was in their interest that they should be tried together. There is no reason to suppose that any confusion was anticipated such as would give rise to an appeal. The trial proceeded, and it is now alleged on one side and admitted on the other that confusion did arise. We think it right to lay down and re-establish the rule which was apparently laid down in *Rex* v. *Blake* (2) that no two persons should be tried together upon a charge of being habitual criminals. Where two or more persons are included in an indictment for a substantive offence followed by a charge against them as habitual criminals, each should be tried separately upon this latter charge. In this case we are satisfied that, both in the minds of the police officers and of the acting chairman at sessions, confusion did exist, particularly as to the relationship existing between Lonsdale and Baker. The confusion was not unnatural seeing that Lonsdale had been previously committed under the name of Baker, and Jack Baker had previously been convicted under his own name of Theodore Baker. The statement by the police that Ross had been convicted with Baker would also go to show that they were old associates in crime. Undoubtedly confusion existed as to the number of years during which Lonsdale was in prison, and the chairman was misled into saying that he had only been four years out of prison since 1894. It is sufficient to say that such confusion existed that the jury may have been led to brand all three as habitual criminals, without distinguishing between them. There was evidence as to each of them that he had endeavoured to earn an honest living. The conviction and sentence for shop-breaking will stand, but their conviction and sentence as habitual criminals must be quashed.

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(1) 5 Cr. App. R. 168, 169. (2) 4 Cr. App. R. 275; 74 J. P. 336.

Solicitor for appellants: *Registrar of the Court of Criminal Appeal; P. Bruce Searl.*

Solicitor for the Crown: *The Director of Public Prosecutions.*

F. P. F.

TEMPUS SHIPPING COMPANY, LIMITED v. LOUIS DREYFUS AND COMPANY, LIMITED.

C. A.
1930
June 30;
July 1, 29.

[1929. T. 1652.]

Shipping—General Average—Charterparty—Bill of Lading—Fire on board Ship—Warranty of Seaworthiness—Damage to Cargo—Exemption from Liability—Actual Fault or Privity—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 502.

By s. 502 of the Merchant Shipping Act, 1894: "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely:—

(i.) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship.". . . .

A steamship was chartered to proceed to various ports in the River Plate and there load a cargo of grain for carriage to Hamburg. The shipowners had provided bunker coal more than enough to take the ship to the loading ports. Some of this coal was stowed in a reserve bunker on the port side separated from one of the ship's holds only by an unprotected steel bulkhead. The coal was unfit for the voyage. In this respect the vessel was unseaworthy. Shortly after she started on the return voyage a serious fire broke out in the port reserve bunker. The captain put into a port of refuge and incurred expense for the benefit of ship and cargo.

In an action by the shipowners against cargo owners for contribution towards a general average expenditure the defendants counterclaimed for damages for injury to their cargo owing to the fire. The fire having happened without the actual fault or privity of the plaintiffs:—

Held, (1.) by Greer and Slesser L.JJ.; Scrutton L.J. dissenting, that by virtue of s. 502 of the Merchant Shipping Act, 1894, which relieved the plaintiffs from liability for loss of or damage to the cargo, they were entitled to general average contribution.

Milburn & Co. v. *Jamaica Fruit Importing and Trading Co. of London* [1900] 2 Q. B. 540, applied.

Held, by the Court (2.) that, notwithstanding the unseaworthiness of their ship, the plaintiffs were not liable for loss of or injury to the cargo.

Virginia Carolina Chemical Co. v. *Norfolk and North American Steam Shipping Co.* [1912] 1 K. B. 229 followed.

Judgment of Wright J. [1930] 1 K. B. 699, reversed in part.

APPEAL from the judgment of Wright J. (1)

A detailed statement of the facts will be found in the judgment of the learned judge. That which follows will, it is hoped, serve to indicate the point decided.

The plaintiffs were the owners of the steamship *Campus.* In May, 1928, that vessel being on passage from Cardiff to Las Palmas was chartered by an Argentine company to proceed to a loading port in the River Parana and there receive a cargo of grain for carriage to Hamburg. The defendants were indorsees for value of a bill of lading which incorporated the terms of the charterparty, by clause 31 of which average, if any, was to be payable according to York–Antwerp Rules, 1924. In order to avoid the expense of coaling abroad the plaintiffs had taken on board the vessel when leaving Cardiff sufficient bunker coal to carry her to the loading ports and for part of the voyage to Hamburg. Some of this coal was stowed in the port reserve bunker separated from one of the holds only by an unprotected steel bulkhead. The coal was unfit for the voyage, and the learned judge at the trial held that the ship was unseaworthy in this respect.

The vessel loaded her first 4000 tons of cargo at Rosario. On June 29, 1928, when she had finished loading there and was proceeding to Villa Constitucion for further cargo, a fire broke out in one of her port bunkers. This was extinguished. Soon after she reached Villa Constitucion a second fire broke out. This was also extinguished, and the ship proceeded on her voyage and reached Martin Garcia Bar on July 2. While there, on July 5, the captain observing smoke arising from the port reserve bunker came to the conclusion that the coal was

(1) [1930] 1 K. B. 699.

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on fire, and after consulting the ship's agents and surveyors decided to put into Monte Video. There the coal was unloaded and stowed on the ship's deck, and the cargo which had become heated had to be discharged into lighters. Part of it was found to be burning. Eleven days passed before the fire in the bunkers was completely extinguished. The unconsumed coal and cargo were then replaced and on July 19 the vessel sailed.

The plaintiffs, as owners of the ship, sued the defendants, as owners of cargo, for contribution in general average towards the expenses thus incurred. The defendants pleaded that the expenditure was occasioned by the plaintiffs' fault in sending to sea an unseaworthy ship and that therefore they could not recover contribution. In addition the defendants counterclaimed the value of that part of the cargo which had been destroyed by the fires mentioned above. To this counterclaim of the defendants and to their previous defence, the plaintiffs pleaded that they were exempted from fault and liability by s. 502 of the Merchant Shipping Act, 1894 (1), and were therefore entitled to contribution to the general average expenditure and were exempted from liability for the damage suffered by the cargo.

Wright J. gave judgment for the defendants on the claim and for the plaintiffs, the shipowners, on the counterclaim.

The plaintiffs appealed from the judgment on the claim. There was a cross-appeal by the defendants from the judgment on the counterclaim.

Raeburn K.C., *Clement Davies K.C.* and *Simey* for the appellants. The learned judge was wrong in holding that in the circumstances of this case the appellants are not entitled to contribution. Prima facie the owner of each interest concerned contributing to a general average expenditure is a creditor of the others for a contribution towards his indemnity. This is subject to the proviso that when a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave

(1) See headnote.

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rise to the claim, he cannot recover from those whose interests are saved: *Strang, Steel & Co.* v. *A. Scott & Co.* (1), per Lord Watson. Thus a shipowner whose ship is unseaworthy cannot recover contribution from cargo owners for loss incurred by the ship through a peril brought about by the vessel's unseaworthiness: *Schloss* v. *Heriot* (2); *The Glenfruin.* (3) The same principle would apply if the loss was due to negligent navigation of the ship. But this limitation of the right to recover contribution is in its turn subject to the exception that if the contract of affreightment exempts the shipowner from liability for negligent navigation, so that the loss cannot be said as between shipowner and cargo owner to be due to the shipowner's fault, then the shipowner is not precluded from claiming contribution from the cargo owner: *The Carron Park* (4); *Milburn & Co.* v. *Jamaica Fruit Importing, &c., Co.* (5) In the present case the learned judge has held that the vessel was unseaworthy. A shipowner may by clear and unambiguous words exempt himself from liability for the unseaworthiness of his ship: *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (6) It is not necessary on this appeal to argue that such a clause would enable a shipowner to recover a general average contribution in respect of a loss incurred through the unseaworthiness of his ship. The loss which gave rise to the general average expenditure was due in this case to fire on board the ship, and s. 502 of the Merchant Shipping Act, 1894, protects the appellants from liability to make good to any extent whatever any loss or damage happening without their actual fault or privity where any goods are lost or damaged by fire on board the ship. The words of the statute must be taken in their ordinary sense. They operate to protect the shipowner from liability for loss or damage to goods by fire on board the ship even when the fire is caused by the ship's unseaworthiness: *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (6);

(1) (1889) 14 App. Cas. 601, 606, 608.
(2) (1863) 14 C. B. (N. S.) 59.
(3) (1885) 10 P. D. 103.
(4) (1890) 15 P. D. 203.
(5) [1900] 2 Q. B. 540.
(6) [1912] 1 K. B. 229.

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Ingram and Royle, Ld. v. *Services Maritimes du Tréport, Ld.* (1) In the *Virginia Carolina Co.'s* case (2) it was also held that a certain clause in the bill of lading had the effect of excluding the operation of the statute and consequently the shipowners were liable for the loss of the goods. In *Ingram and Royle's* case (1) the bill of lading contained no such clause and so it was held that the statute exempted the shipowners from liability for loss of the goods. It would follow from *Milburn & Co.* v. *Jamaica Fruit Importing, &c., Co.* (3) that the shipowners in *Ingram and Royle's* case (1) would not be debarred from claiming contribution for any general average loss they had sustained through the fire on board their ship. There is nothing to suggest that s. 502 of the Merchant Shipping Act, 1894, has become in any way inoperative in the present case, which therefore falls within the principle of *Ingram and Royle's* case. (1) It follows that the appellants are not liable for the loss through fire on board their vessel and are therefore entitled to recover contribution for the general average loss they sustained in consequence of it.

Sir Robert Aske for the respondents. Where goods are lost or injured by fire on board the ship, even though the fire was due to unseaworthiness of the ship, s. 502 of the Merchant Shipping Act, 1894, relieves the shipowner from liability to pay damages for the loss of or injury to the cargo. But the section goes no further than that. Where the fire takes place through the shipowner's default it does not alter the character or quality of the default or otherwise affect its consequences. If the fire breaks out as a result of the ship's unseaworthiness, the Act does not provide that the ship shall be deemed to be seaworthy. It does not convert default into performance or negligence into an exercise of due care. The effect of s. 502 is similar to that of s. 503, which limits the amount recoverable by the owner of cargo; but does not, when the shipowner has paid that amount, put him into the position of a perfectly innocent person: *The Ettrick* (4), per Jessel M.R. and Brett L.J. In that case a ship with a cargo

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(1) [1913] 1 K.B. 538 [1914] 1 K.B. 541.
(2) [1912] 1 K. B. 229.
(3) [1900] 2 Q. B. 540.
(4) (1881) 6 P. D. 127, 132, 136.

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of wool was sunk through the negligence of the shipowner or his servants. He paid to the cargo owner the amount limited by s. 503 in respect of cargo that was damaged. It was held that he could not recover from the cargo owner any contribution towards the expense of salvage operations whereby the ship and cargo were raised. Nor can a shipowner rely on s. 502 as relieving him from his obligation to contribute to a general average expenditure incurred by the cargo owner to save ship and cargo from destruction by fire on board the ship: *Schmidt* v. *Royal Mail Steamship Co.* (1); *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (2); because, in the words of Lord Halsbury in the latter case, "the statute is not dealing with average at all." (3) Since *Milburn & Co.* v. *Jamaica Fruit Importing, &c., Co.* (4) it cannot be argued in this Court that a shipowner is debarred from claiming contribution for a general average loss, although occasioned by negligent navigation of the ship, where negligence of the master is among the exemptions from liability in the bill of lading; but it by no means follows that a shipowner could, by a clause excusing him from liability for loss due to unseaworthiness of his ship, entitle himself to claim contribution for a loss to the ship brought about by her unseaworthiness. Liability or immunity from liability for the negligence of the ship's captain is a mere matter of contract between shipowner and cargo owner. The right to contribution in general average arises not from agreement between the parties, but by the force and authority of the maritime law. The principle of *Milburn & Co.* v. *Jamaica Fruit Importing, &c., Co.* (4) ought to be restricted to cases of special contract between the parties. A statutory exception like that created by s. 502 of the Merchant Shipping Act, 1894, stands upon a different footing: Lowndes on General Average, 6th ed. (1922), pp. 746-748; *The Irrawaddy* (5); *The Strathdon* (6); *New York and Cuba Mail Steamship Co.* v. *Ansonia Clock Co.* (7); *The Jason.* (8)

(1) (1876) 45 L. J. (Q. B.) 646.
(2) [1908] A. C. 431.
(3) [1908] A. C. 431, 436.
(4) [1900] 2 Q. B. 540.
(5) (1897) 171 U. S. 187.
(6) (1900) 101 Fed. Rep. 600.
(7) (1905) 139 Fed. Rep. 894.
(8) (1910) 178 Fed. Rep. 414.

Furthermore, in answer to the appeal and also in support of the cross-appeal :—

1. There was not sufficient evidence that the fire, such as it was, happened without the actual default or privity of the appellants. Not until the third fire broke out was any report sent to the owners or agents of the ship. No special instructions were ever given to the master, although the owners must have known that there was a danger of fire when the ship started for the River Plate with coal on board : *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (1)

2. There was not sufficient evidence that the maize was lost or damaged through any actual fire on board. It is consistent with the appellants' case that the damage was due to heating caused by the unseaworthiness of the vessel.

The result is that the appellants cannot rely on s. 502 of the Merchant Shipping Act, 1894 ; they cannot claim general average contribution, and they have no answer to a claim for loss of or injury to the cargo.

Counsel for the appellants were not called upon to answer the cross-appeal. In reply on the appeal—

Raeburn K.C. cited Scrutton on Charterparties, 12th ed. (1925), art. 108, p. 313.

Cur. adv. vult.

July 29. The following written judgments were delivered :—

SCRUTTON L.J. This appeal raises a question in the higher altitudes of the law of shipping and general average, which has been the subject of much difference of opinion in the profession for many years. It can be stated shortly to be what are the real meaning and limitations of s. 502 of the Merchant Shipping Act, 1894, which relieves the shipowner from certain liabilities in the case of fire, when applied to cases where the ship was unseaworthy at starting, and the unseaworthiness caused the fire, and general average expenditure to avoid future fire.

Fortunately, the facts are not really in dispute. The steamship *Campus* having carried coal from England to the

(1) [1914] 1 K. B. 419.

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Plate was chartered to take a cargo of grain to Hamburg. The shipowners to save the expense of coaling at the Plate had carried sufficient bunkers on the outward voyage to take their vessel home. But, as has happened in many other cases, the bunker coal at the Plate turned out to be in a dangerous condition. While the ship was loading there were two small fires in two separate bunkers on the port side, which the captain unfortunately did not report to his agents or owners. On starting, before the vessel got over Martin Garcia Bar, another and more serious fire broke out in a third and larger bunker on the port side, and the maize next to that bunker was found to be heated and in danger of catching fire. It became necessary to put into Monte Video as a port of refuge, in which process port of refuge expenditure was incurred. The shipowners then sued the cargo owners for contribution to this general average expenditure, to which the cargo owners replied that, as the expenditure was occasioned by the fault of the shipowners in sending an unseaworthy ship to sea, the shipowners could not recover it. The cargo owners claimed the value of the maize destroyed by fire ; to this and to the previous defence of the cargo owners the shipowners replied that s. 502 of the Merchant Shipping Act, 1894, protected them. Wright J., in a very careful judgment, held that the section protected the shipowners against the cargo owners' claim, but did not support or justify their own claim for general average contribution.

It is possible to deal shortly with the cargo owners' appeals. Sect. 502 is in these terms : " The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases ; namely—(i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship." If there were no authority it would, I think, be a difficult and important question whether the section protected the shipowner if the fire was caused by initial unseaworthiness. It is clear that in such circumstances the exception in the contract of affreightment, "fire on board," would not protect the shipowner from the breach: see *The Glenfruin* (1); and *Tattersall* v. *National Steamship Co.* (2) But the question whether the unseaworthiness of the ship causing the fire destroys the statutory protection has in my opinion been decided in the negative by authorities binding this Court, though the question is well worthy of review in the House of Lords. In the *Virginia Carolina Co.'s* case (3) two preliminary questions were ordered to be tried: (1.) Whether unseaworthiness of the ship causing fire destroyed the protection given by s. 502; (2.) Whether a special contract as to unseaworthiness contained in the bill of lading prevented the shipowner from relying on s. 502. As to the first question Bray J. and the Court of Appeal held that such unseaworthiness did not destroy the protection of the statute. On the second question they held that the special clause in the bill of lading did destroy the protection of the statute. The case was taken to the House of Lords (4), which on October 21, 1912, declined to decide the questions asked till it was ascertained whether the ship was in fact unseaworthy. On the case being tried on this issue (the trial of which on evidence the order for trial of preliminary questions had been intended to avoid) the ship was found seaworthy, and the questions became academic in that case and the House of Lords did not decide them. With all respect it seems to me a pity that the House did not answer the first question, as, if they agreed with the Court of Appeal, the unseaworthiness of the ship was immaterial, and the trial of an expensive issue of fact was avoided. In 1913 I had to try a similar question in *Ingram and Royle's* case (5) and endeavoured to follow the decision of the Court of Appeal in the *Virginia Carolina Co.'s* case. (3) On appeal (6) the Court followed the *Virginia Carolina Co.'s* case (3) on the first question, but held I had misapplied its decision on the second question. The result is that this Court is bound to hold that the protection given by s. 502 against claims for loss of or damage to goods is not removed if unseaworthiness causes the fire, though in such a case the protection of exceptions in the bill of lading is lost. The matter can only be dealt with by the House of Lords. The claim of the cargo owner is then for damage caused to his goods by fire: this is the exact thing from which the words of s. 502 protect the shipowner.

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(1) 10 P. D. 103.

(2) (1884) 12 Q. B. D. 297.

(3) [1912] 1 K. B. 229.

(4) *Norfolk & North American Steam Shipping Co.* v. *Virginia Carolina Chemical Co.* [1913] A. C. 52.

(5) [1913] 1 K. B. 538.

(6) [1914] 1 K. B. 541.

The cargo owner in his cross-appeal relies on two points. (1.) That there is no sufficient evidence that the damage to the maize was caused by fire in the adjacent bunker, the maize having been seen to steam before fire was actually seen in the bunker. I have considered the details of the evidence and am satisfied that there is no ground for interfering with the decision of Wright J. on this point. (2.) That the judge below should have found "actual fault or privity" in the managing director of the plaintiff company, destroying the protection of the statute. There is no ground for saying that improper bunkers were supplied to the ship, or that the owners knew of the two early fires, but it is said there was actual fault in not giving instructions to the master as to what to do if signs of fire in the bunkers showed themselves. This seems to me not to be a case like the *Clan Line* case (1), where the owners had special information as to the stability of a particular type of ship, which a master could not be expected to know and were held in fault for not communicating that information to the master. It is rather like our decision in the *Rostellan* case (2), where we held that owners were not bound to give experienced and competent officers detailed instructions as to examination of hull and sails before starting on a voyage.

For these reasons the cross-appeal of the cargo owners against the decision of Wright J. dismissing their claim for damage to their goods by fire on the ground that s. 502 protects the shipowner, must fail.

The appeal of the shipowner raises much more difficult questions, and requires a careful consideration of the nature of the claim and the words of the statute. The shipowner's protection is from liability where goods are lost or damaged by fire on board his ship; his present claim is for a contribution to general average expenditure incurred to prevent ship and goods being lost or damaged by fire in the future. There is a marked difference between general average sacrifice of ship or goods, such as jettison, the whole of which can be recovered from the underwriter as a loss by perils insured against: *Dickenson* v. *Jardine* (1), and general average expenditure, which cannot be so recovered: *The Mary Thomas* (2); Arnould on Marine Insurance, § 976. The recovery of a contribution to general average expenditure does not relate to damage to goods, but to a matter peculiar to the law of the sea relating to general average. The authorities lay down that s. 502 has nothing to do with general average contributions and cannot be used as a defence against them.

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(1) *Standard Oil Co. of New York* v. *Clan Line Steamers* [1924] A. C. 100.

(2) (1929) 35 Ll. L. Rep. 117, 126.

In *Schmidt* v. *Royal Mail Steamship Co.* (3), on the voyage, without fault of shipowner or cargo owner, fire broke out and in extinguishing it other goods were damaged by water thrown down the hold. When the shipowner was asked to contribute to the cost of this measure as a general average sacrifice he replied that s. 502 freed him from damage by fire and therefore from this claim. Blackburn and Lush JJ. held that the section was no defence to a claim for contribution to the cost of sacrifices made for the general benefit to avert loss by fire.

This was confirmed in *Greenshields, Cowie & Co.'s* case (4) by the House of Lords. There a fire broke out in the cargo of coal whilst on the voyage, without the fault of shipowner or cargo owner, though from the fault of the cargo, and the vessel, as in the present case, put into a port of refuge to save the whole adventure. The cargo owners claimed from the shipowner contribution to the general average sacrifice of the coal. The shipowner amongst other points took the point that as the claim was consequent on the fire, he was

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(1) (1868) L. R. 3 C. P. 639.

(2) [1894] P. 108, 115, 121, 123.

(3) (1876) 45 L. J. (Q. B.) 646.

(4) [1908] A. C. 431.

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freed by s. 502 from liability. (1) The House of Lords, affirming the Court of Appeal, and approving *Schmidt's* case (2), held the statute was no defence. Lord Halsbury said (3): "As to the point under the statute, I agree with the Court of Appeal that it is much too late to raise such a point now, even if there were more in it than I think there is. The real answer, however, is that the statute is not dealing with average at all, and this has been in effect decided long ago, either upon the words of this statute or words which would have raised the same point in other statutes." If the statute is held to be no defence to the shipowner against a claim for general average contribution to sacrifice or expenditure caused by, and used to, avert fire, it is difficult to see how it can be used to support such a claim. The argument is put in this way. By the law of the sea apart from York–Antwerp Rules, a party to the adventure cannot recover a general average contribution to avert a peril which is caused by his own "fault." "Fault" has been interpreted as "actionable fault." Therefore, in *The Carron Park* (4) Sir James Hannen refused to allow the negligence of the shipowners' servants to prevent the shipowner from claiming a general average contribution to expenditure to avert a peril caused by such negligence. He did so for the reason that as in the charter the shipowner had an exception protecting him against the negligence of his servants, he was not legally "in fault." The Court of Appeal in *Milburn's* case (5) under similar circumstances held the same thing. But the present case is quite different. Unseaworthiness has caused the fire, and the shipowner has no protection under the contract of affreightment against unseaworthiness. That the ship started unseaworthy prevented the shipowner from relying on the exception "fire on board" or any special provision of the York–Antwerp Rules, 1924, altering the law of the sea. Indeed counsel for the appellants agreed he could get no protection out of those Rules, in view of the proviso to

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(1) See [1908] 1 K. B. 55; [1908] A. C. 431.

(2) 45 L. J. (Q. B.) 646.

(3) [1908] A. C. 435.

(4) 15 P. D. 203.

(5) [1900] 2 Q. B. 540.

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Rule D. The shipowner then attempts to make an answer to a defence to the claim, which is : " You are in fault for providing an unseaworthy ship where the unseaworthiness caused the fire," the reply : " But I am not in fault, for s. 502 protects me from liability for damage to goods by fire." But the answer of *Greenshields*' case (1) is : " The statute has nothing to do with general average contribution to expenses incurred to avert fire in the future and is not a defence to such a claim." It is an answer to a claim for damage to goods caused by fire, though the ship is unseaworthy, if the decision in the *Virginia Carolina Co.'s* case (2) is right, but on the authority of the House of Lords in *Greenshields*' case (1) it has nothing to do with claims for general average contribution, though fire caused the sacrifice or expenditure. The point may be put in other words thus. There is no exception in the contract of affreightment against unseaworthiness, and as the fire was caused by unseaworthiness, the exception " fire on board " and the inclusion of the York–Antwerp Rules do not protect the shipowner. As far as the contract of affreightment is concerned, he is " in fault " with no contractual protection. When therefore he tries to recover, not the loss of goods or ship's tackle, which under *Dickenson* v. *Jardine* (3) he might perhaps recover against underwriters as a loss by fire, but general average expenditure to avert future fire, the whole of which under *The Mary Thomas* (4) he could not recover from underwriters as a loss by fire, the cargo owner meets him with a defence : " The general average expenditure was due to your fault for which the contract of affreightment does not excuse you, as it did in *The Carron Park* (5) ; and *Milburn's* case. (6) " That may be," says the shipowner, " but s. 502 of the statute excuses me, so I am not in fault." The answer is that the statute by its words does not excuse the shipowner from liability for general average contribution to expenditure, as was decided by the House of Lords in *Greenshields*' case (1), and therefore the shipowner remains in his original fault under the contract of affreightment of unseaworthiness causing loss, not excused by a statute which does not free him from liability to contribute to general average expenditure caused to avoid future fire. The wording of s. 502 does not seem to have any relation to claims for general average expenditure.

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(1) [1908] A. C. 431.
(2) [1912] 1 K. B. 229.
(3) L. R. 3 C. P. 639.
(4) [1894] P. 108.
(5) 15 P. D. 203.
(6) [1900] 2 Q. B. 540.

In my view Wright J. came to a correct conclusion on both the appeal and the cross-appeal. They should both be dismissed with costs, with a set-off of costs. But as my brothers take a different view on the appeal by the shipowner, the judgment of the Court will be as they propose.

GREER L.J. The liability to contribute to general average arises when in the course of a voyage a sacrifice is made of some of the property at risk, or expense is incurred in order to avert some impending danger to all the property at risk. Though the obligation to contribute, and the right to demand contribution, may be controlled by contract, they did not in origin depend upon contract, but on an equitable rule adopted from the Rhodian Laws to the effect that extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo in the time of peril should be borne proportionally by all who are interested : see per A. L. Smith and Vaughan Williams L.JJ. in *Milburn & Co.* v. *Jamaica Fruit Importing, &c., Co.* (1)

" Before either the shipowner or the owner of the cargo can claim contribution as general average for a sacrifice of his property, or an expense incurred by him, in order to avert a total loss of ship and cargo, he must be in a position to prove in case of need that the total loss in question was not one for which he himself would have had to pay." This definition is quoted from Lowndes on General Average. (2 I think it accurately summarizes the essential elements involved in the conception in English law of a right to share in general average. Judges have from time to time stated in varying words the circumstances which give rise to a right to general average contribution. For example, Blackburn J.

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(1) [1900] 2 Q. B. 540.

(2) 6th ed. (1922), p. 35.

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said in *Kemp* v. *Halliday* (1): " In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy, but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off." Lord Kingsdown said in *Cargo ex Galam* (2): " It is a loss incurred for the general benefit of the ship and cargo, to which those who have received the benefit are by law liable to contribute rateably." The effect of the judicial definitions given from time to time with regard to general average is stated in art. 108 of Scrutton on Charterparties (3), as follows: " All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionably by all who are interested. To give rise to a claim for general average contribution: (1.) There must be a common danger, which must be real, and not merely apprehended by the master, however reasonably. (2.) There must be a necessity for a sacrifice. (3.) The sacrifice must be voluntary. (4.) It must be a real sacrifice, and not a mere destruction and casting off of that which had become already lost and consequently of no value. (5.) There must be a saving of the imperilled property through the sacrifice. (6.) The common danger must not arise through any default for which the interest claiming a general average contribution is liable in law. Therefore the fact that the common danger arises from the nature of the cargo (e.g., from spontaneous combustion of coal) does not prevent the cargo owner from claiming contribution for sacrifice of the cargo, unless he was guilty of some breach of contract or of duty in shipping it."

The question has been discussed from time to time whether the liability to contribute arises out of contract or independently of contract. From the nature of the case it seems that in origin the right to contribution was quite independent of any contract. The law governs the relations of cargo owners to shipowners between whom there is a contract of carriage, and the relations between one cargo owner and another cargo owner between whom no contractual nexus exists. Though the right to a general average contribution does not arise from contract, it may as between shipowner and cargo owner be controlled by contract, and the York–Antwerp Rules were drawn up for the purpose of regulating the contractual rights of shipowner and cargo owner so far as consistent with the express contract made between them. It might well have been decided at one time that it was inequitable to allow a shipowner, who had by his fault brought about the danger which gave rise to the general average sacrifice, any right to any contribution in the nature of general average. It might have been held that the law disabled him from recovering if he was in fault, quite irrespectively of the question whether the contract between him and the cargo owner excused him from the consequences of his fault; and, as pointed out by Mr. Raeburn in argument, the late Mr. Carver adopted this view of the law until he felt himself precluded from maintaining it by the decision of the Court of Appeal in *Milburn & Co.* v. *Jamaica Fruit Importing, &c., Co.* (1) which approved and affirmed the decision in *The Carron Park.* (2) The effect of these two decisions appears to me to be that in considering whether the shipowner is in fault so as to lose his right to contribution, the question is whether, having regard to his obligations to the cargo owners, he has committed an actionable wrong which has given rise to the need for the general average sacrifice or expenses. In *Kish* v. *Taylor* (3) Lord Atkinson describes the shipowner who is disentitled to recover as a wrongdoer. In *The Carron Park* (2) the charterparty contained an exception of neglect or default of the master, crew, or other servants of the shipowner.

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(1) (1866) 6 B. & S. 723, 746.

(2) (1863) 33 L. J. (P.) 97, 102.

(3) 12th ed. (1925), p. 313.

(1) [1900] 2 Q. B. 540.

(2) 15 P. D. 203.

(3) [1912] A. C. 604, 620.

The defendants incurred a general average expenditure to which they were held to be entitled to call on the cargo owner to contribute on the ground that the loss would not have fallen on the shipowner, and the expenditure and sacrifice made by him were not made to avert loss from himself alone, but were made to avert a loss that would fall on all the interests involved. In that case the President relied upon the statement of Lord Watson in *Strang, Steel & Co.* v. *A. Scott & Co.* (1), that the fault of the master would prevent the owners of a ship from recovering a general average contribution, "unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers." *The Carron Park* (2) was approved and followed in the Court of Appeal in *Milburn & Co.* v. *Jamaica Fruit Importing, &c., Co.* (3) The argument that prevailed in the latter case was very clearly stated by Walton J. (then Mr. Joseph Walton, Q.C.) (4): "The reason why by the law maritime the shipowner cannot obtain general average contribution in respect of a sacrifice or expense necessitated by his servant's negligence is that, in the absence of a negligence clause, he is in default, and has committed through his servant a breach of duty; and he cannot claim contribution towards the sacrifice or expense incurred by him in endeavouring to obviate the danger occasioned by his default: *Strang, Steel & Co.* v. *A. Scott & Co.* (5) But, where the negligence of the master and crew is mutually excepted, the shipowner is not in default by reason thereof, and therefore there is no reason in such a case why the right to general average contribution should not exist in his favour."

It seems to me that the question which has to be asked in cases of this kind is: "Is the danger which occasions the sacrifice or the expense sought to be recovered one for which the shipowner is responsible to the cargo owners, so that it can be said that he has made the sacrifice or incurred the expense not for the benefit of all concerned, but for his own benefit only ? " I think it is not ad rem to say that the shipowner's non-responsibility for the danger is due to a statutory provision, and not to the terms of the contract. The fact remains that whether the responsibility is taken off his shoulders by a clause in an Act of Parliament, or by the terms of the contract of carriage, he is incurring general average expenses acting for the benefit of all concerned and not for his own sole benefit. It was suggested in the course of the argument that the statute does not provide that the shipowner shall not be deemed to be in fault, but only provides that he shall not be liable to make good the loss or damage caused by reason of fire without his actual fault or privity. I do not think there is any substance in the alleged distinction between a statutory elimination of a duty, and a statutory provision that there shall be no liability for an act. In either case it seems to me the default is negatived. Assuming, as we must do, having regard to the decision in *Virginia Carolina Co.* v. *Norfolk and North American Steam Shipping Co.* (1), that damage by fire occasioned by unseaworthiness is within the protection of s. 502 of the Merchant Shipping Act, 1894, if the owner establishes that such unseaworthiness was without his actual fault or privity, I am of opinion that there is nothing in the facts of this case to deprive the shipowner of the right to contribution claimed in this action.

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(1) (1889) 14 App. Cas. 601, 609.
(2) 15 P. D. 203.
(3) [1900] 2 Q. B. 540.
(4) [1900] 2 Q. B. 543.
(5) 14 App. Cas. 601.

Certain cases were relied upon by Wright J. and in the argument for the respondents before us, as inconsistent with this view, especially *Schmidt* v. *Royal Mail Steamship Co.* (2) and *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (3) Neither of these cases was a case in which the shipowner's liability to obtain contribution from the cargo owners was in question. They were both cases in which the claim was by the cargo owner against the ship. In *Schmidt* v. *Royal Mail Steamship Co.* (2) it was held that an exception in the charterparty did not exempt the shipowners from the liability to contribution in general average, nor did s. 503 of the Merchant Shipping Act, 1854.

(1) [1912] 2 K. B. 229.
(2) 45 L. J. (Q. B.) 646.
(3) [1908] A. C. 431.

It is not suggested in the present case that s. 502 of the Merchant Shipping Act, 1894, relieves the shipowner from liability to contribute, but only that it puts him in such a position that he cannot be said to be deprived of his right to a contribution from the cargo owners on the ground that his expenses were incurred merely on his own behalf and not on behalf of all the interests. It is not contended in the present case that the shipowner is freed from making his own contribution to the general average, but only that there is nothing in the facts of the case that deprives him of the right to say that as between him and the cargo owners he was not in default, and therefore the cargo owners must contribute to general average. It seems to me that neither *Schmidt* v. *Royal Mail Steamship Co.* (1) nor *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (2) has any bearing on the question we have to determine in this appeal. The appellant does not rely upon the statute as giving him a right to recover contribution from the cargo owners, but he says that if the cargo owner pleads that he is disentitled to recover by reason of the fact that the expenses were incurred solely for himself, he then can reply, that is not true, because by reason of the provisions of the Act which have not been altered by agreement, he was not in default at all, and that, when he incurred the general average expenses for which he is claiming, he incurred them not on his own behalf, but on behalf of all the interests concerned.

It is no doubt true, as Lord Halsbury said in *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (2), that s. 502 of the Merchant Shipping Act, 1894, is not dealing with average at all. It does not qualify the rule that if the shipowner is in default, and the expenses he seeks to recover are expenses he incurred to save himself from a loss that would fall on him alone, he is not entitled to call on cargo owners for contribution. But the statute does alter the situation that arises when the decision is taken by the master to incur the expenses in question. By reason of the immunity from liability created by the statute, the expenses incurred by the master are incurred not for the ship

(1) 45 L. J. (Q. B.) 646.

(2) [1908] A. C. 431.

alone, but for all the interests concerned. I do not think *The Ettrick* (1) is a decision to the contrary. Sect. 503 is a section which does not take away the ship's responsibility for damages; it only limits the amount. Therefore when general average expenses are incurred, it cannot be truly said that they are incurred for the benefit of the ship alone. Sect. 503 has nothing to do with the question whether the shipowner is in default or not; it only provides that where he is in default the amount of the damages that can be recovered from him is limited.

The respondents also relied upon the decision of the majority of the Supreme Court of the United States in *The Irrawaddy*. (2) The majority of that Court decided that the Harter Act had no effect upon the right of the shipowner to recover contribution from the cargo owners in a case in which a section of the Act relieved him from responsibility in damages. I think the decision of the majority turned on distinctions which exist between the law of the United States and the law of this country on the question of the liability of shipowner to cargo owner. It is pointed out (3) that "whatever may be the English rulings as to the effect of contract immunity from negligence as entitling the shipowner to claim in general average, we do not think the cases are parallel. By the English law the parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit. Very different is the case where a statute prescribes the extent of liability and exemption." It is not correct to say that s. 502 of the Merchant Shipping Act prescribes the extent of the liability and exemption of each party. It only provides for what are to be the obligations in a certain event of the shipowner in the absence of any agreement to the contrary. In any event we are not bound by the decision in *The Irrawaddy* (2), and the reasoning of the judgment of the minority in that case seems to me more convincing than that of the majority.

With regard to the counterclaim, the learned judge had to determine upon the evidence whether the damage was due to fire, or merely to heat, and whether want of privity of the owner was established. He had to exercise his judgment on the probabilities of the case, and I do not feel myself justified in saying that his conclusions of fact were wrong. On this part of the case I agree with the judgment of Scrutton L.J.

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(1) 6 P. D. 127.

(2) 171 U. S. 187.

(3) 171 U. S. 195.

In my opinion the appeal of the plaintiffs should be allowed with costs, and the cross-appeal dismissed with costs.

Slesser L.J. The points of claim in this case allege that the steamship *Campus*, the property of the plaintiff Company, suffered fire on board during a voyage to Las Palmas which made it necessary for her to put into Monte Video, whereby expense arose.

The defendants are, by indorsement of bill of lading, owners of cargo which was carried on the voyage, and it is alleged that expenditure in running to the port of refuge was incurred by the plaintiffs to avoid a total loss of all interests for which the defendants, owners of cargo, are liable in general average. The defendants plead, in so far as is material to this appeal, that the steamer was unseaworthy and unfit, and that the matters alleged as founding a claim to general average were occasioned by default of the shipowner—namely, by the unseaworthiness or unfitness; they give the particulars as to the treatment of the bunker coal as the cause of fire, which have been stated by Scrutton L.J. The defendants counterclaim that their cargo was burned or injured in breach of the contract of carriage by the plaintiffs and assess their claim at 1572*l*. 4*s*. 10*d*.

On a review of the evidence Wright J. has said: "I cannot arrive at any conclusion save that the coal was unfit for the voyage, and that the ship was in that respect unseaworthy." There is in this contract no exception for unseaworthiness, and I agree with Scrutton L.J. that the fact that "the ship started unseaworthy prevented the shipowners from relying upon the exception of fire on board, or any special provision of the York–Antwerp Rules, 1927," here incorporated in the contract.

Were the matter to rest there, it is clear that the defendants, on the finding of the learned judge of unseaworthiness, would be entitled to succeed as to the claim and could properly say that the common danger was due to the default of the shipowner, and that therefore he would lose whatever right he might otherwise possess to general average contribution; but the real point here to be decided is whether, having regard to s. 502 of the Merchant Shipping Act, 1894, the shipowner is or is not saved from the consequences of default by that section, and so nevertheless is entitled to recover. Sect. 502, which thus becomes of vital importance in this case, is as follows: "The owner of any British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely, (i.) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

My brothers are in agreement that, on the facts of this case, it is not possible to say that there was actual fault or privity of the owners, and respectfully I agree with them. Whatever error was made was the fault of officers, not alleged to be incompetent, and not the owners' actual fault or privity: see *The Rostellan*. (1) The section therefore stands to protect the shipowner from any liability to make good the damage to the cargo, but the question remains, does it extend to enable him to claim the general average contribution which otherwise he would have lost by his own default in the unseaworthiness of his vessel?

The decisions in *The Carron Park* (2) and *Milburn & Co.* v. *Jamaica Fruit Importing, &c., Co.* (3) make it clear that if the liability of the shipowner, which would otherwise arise, is excluded by exception in the contract; the case has thereby been taken out of the rule that where the common danger arises from his own default, he cannot claim general average, and in such a case, not being directly liable for the default, his sacrifice (which, if it had not been made and the goods lost, would have laid upon him no actionable liability) is one

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(1) 35 Ll. L. Rep. 117, 126.
(2) 15 P. D. 203.
(3) [1900] 2 Q. B. 540.

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for which he can claim contribution. It still remains to be decided whether s. 502, which, in the absence of fault or privity, protects him from liability to make good the damage by fire, does or does not extend to confer on him the same immunity as if the common danger had not arisen through any default for which he is liable in law.

It is to be noticed that the section does not contain any absolute exception of liability, but is limited to protection from liability to make good damage to goods, merchandise or other things. Notwithstanding this saving of liability, is there still left over and above a default or wrongdoing causing the common danger which excludes the shipowner from making a claim to general average? No direct authority exists to conclude this problem, but certain cases turning on s. 502 must be considered.

In *Schmidt* v. *Royal Mail Steamship Co.* (1) there was fire on board without fault of the shipowner or cargo owner, and goods were damaged. The shipowner was sued in general average in that he had injured goods in saving the ship. He pleaded s. 502, and argued that because he was freed of liability for damage to the goods, he was therefore not liable for general average contribution. It was held that the words of the section only protected him from damage to the goods, but had nothing to do with general average, and that, notwithstanding the section, he was liable. This was followed in *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ld.* (2) in the House of Lords. These cases seem clearly to follow the actual words of the statute which in terms limit the liability of the shipowner to cases where he might otherwise be liable to make good damage to goods. The liability to general average, it was said, is not liability for damage to goods, and therefore was held to be unaffected by the section.

I cannot see how these cases really help to elucidate the present problem; they turn upon the extent of the immunity of the shipowner, and when the language of the section is considered, it is clear that it does not extend to an immunity on the part of the shipowner for general average; the problem here rather is (the shipowner not being entitled to claim general average where the common danger has arisen through his default, for which he is liable in law), is there any actionable default for which it can be said he is liable in law, except the actionable wrong of injuring the cargo owners' goods, from which he is expressly protected ?

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(1) 45 L. J. (Q. B.) 646.

(2) [1908] A. C. 431.

It is argued for the cargo owners that there may be a default on the part of the shipowner over and above that which is dealt with under s. 502, and that when there is any default whatever, there is no sacrifice ; but I asked in vain during the argument to have that actionable default defined. It must be admitted that, whatever the shipowner did to save the cargo, if he had not done it, no action would have lain against him. If this be true, his whole behaviour was a voluntary sacrifice. This fact distinguishes this case from *The Ettrick* (1), a case of contribution to salvage decided under s. 54 of the Merchant Shipping Act, 1862, now substantially s. 503 of the present Act. In that case Brett L.J. says (2): "But then it is said that the statute which limits the liability to 8*l.* purges the negligence and the default, and puts the plaintiff, on payment of the 8*l.*, into the position of a perfectly innocent person." As is there pointed out, under that section the owner's liability is limited in certain cases of injury or damage to 8*l.*, but over and above that sum it may properly still be said that he has committed an actionable wrong which would exclude him from the contribution to salvage there claimed. Applying that section to this case, the owner on claiming general average, if he could only rely on s. 503, would be met by the plea that he was still a wrongdoer to the extent of all damage beyond 8*l.*, and that consequently the common danger caused by unseaworthiness could yet be said to arise through his default.

The case of the *Virginia Carolina Co.* v. *Norfolk and North American Steam Shipping Co.* (3) has decided that fire caused by unseaworthiness is within the protection of s. 502 of the Merchant Shipping Act, 1894, and the result in my judgment

(1) 6 P. D. 127.
(2) 6 P. D. 136.
(3) [1912] 1 K. B. 229.

is that the statute has produced the same state of affairs as did the exceptions in the contracts in *The Carron Park* (1) and *Milburn & Co.* v. *Jamaica Fruit Importing, &c., Co.* (2), so that it is not possible to say that the common danger has arisen through any default for which the shipowner is liable in law.

For these reasons I agree with the judgment of Greer L.J. that this appeal must be allowed as to the claim. It follows from my judgment as to absence of fault or privity on the part of the shipowner that the cross-appeal must be dismissed.

Appeal allowed. Cross-appeal dismissed.

Solicitors for appellants: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for respondents: *Ince, Colt, Ince & Roscoe.*

W. H. G.

G. C. DOBELL AND COMPANY, LIMITED *v.* BARBER AND GARRATT.

[1930. G. 570]

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Oct. 24, 27. 28; *Nov.* 17,

Sale of Goods—Statutory Warranty—Linseed Cake—"Sale for use as food for cattle"—Cake sold "tel quel" and Seller accepting no Responsibility for Analysis—Injurious Constituent not disclosed by Analysis—Resale of Cake—Injury to Cattle—Liability of Seller—Damages—Fertilisers and Feeding Stuffs Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 45), *ss.* 1, 2, 24, *Schedules I., II., IV.*

The plaintiffs bought from the defendants, both being cattle food merchants, a quantity of linseed cake. The defendants sold in their own name, but they were in fact acting in the transaction as brokers for a bank to whom the goods had been hypothecated as security for certain bills of exchange which had been refused acceptance by the drawees. The sale note stated (inter alia) that the cake was sold "tel quel," and that the analysis, for which the defendants said they accepted no responsibility, showed that the cake was "castor free." The plaintiffs resold portions of the cake to their customers as food for cattle. It then appeared on further analysis that portions of the cake contained castor seed, a constituent injurious to cattle; and in fact cattle which were fed on some of the cake were injured. Claims were thereupon made upon the plaintiffs by their purchasers in respect of the damage so caused to their cattle, and the plaintiffs then claimed damages from

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(1) 15 P. D. 203.

(2) [1900] 2 Q. B. 540.

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the defendants, including in their claim the amounts they had to pay to the sub-purchasers:—

Held, by the whole Court: (1.) that the sale of the cake by the defendants to the plaintiffs was a sale for use as food for cattle, within s. 2, sub-s. 2, of the Fertilisers and Feeding Stuffs Act, 1926, which provides that on the sale for use as food for cattle of certain articles, including linseed cake, " there shall be implied, notwithstanding any contract or notice to the contrary, a warranty by the seller that the article is suitable to be used as such," notwithstanding that the plaintiffs themselves did not intend to use the cake for that purpose but intended to resell it to those who would so use it;

(2.) By Scrutton and Lawrence L.JJ. (Greer L.J. dissenting), that the sale, though in fact effected by the defendants on behalf of the bank, was not a sale " in exercise of a statutory power to enforce a right or to satisfy a claim or lien," within s. 24 of the Act of 1926 so as to be exempt from the operation of the Act; and

(3.) By Scrutton and Lawrence L.JJ. (Greer L.J. dissenting), that the plaintiffs were entitled to damages from the defendants for the breach of the statutory warranty, and were entitled to include in those damages the amounts they were liable to pay to their sub-purchasers.

Decision of Roche J. varied.

Appeal from a decision of Roche J.

On September 12, 1929, the defendants, who carried on business as merchants in Liverpool, dealing in (inter alia) cattle food, sold in their own names to the plaintiffs, who were also cattle food merchants, two parcels of linseed cake by the description and on the terms contained in the defendants' sale notes and accompanying certificates of analysis—namely: " Balance, estimated at about 98 tons, ex s.s. *City of York*, and balance, estimated at about 107 tons ex s.s. *Elysia*, of ' Expeller ' linseed cake at 11*l*. 17*s*. 6*d*. per ton, in bags, gross re-weights, ex store Liverpool. Bulk approved. The cake is sold ' tel quel ' in all respects but Ormerod & Fowweather's analysis, for which sellers accept no responsibility, is: 8·93 % oil; 29·22% albuminoids, castor-free."

The cakes in question came from India, and it was generally known that cakes imported thence were liable to contain an admixture of castor seed owing to the fact that the same presses were used to crush linseed and castor seed, and the presses were not always thoroughly cleaned after crushing castor seed and before being used again to crush linseed.

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The plaintiffs alleged that the defendants sold the cakes for use as food for cattle well knowing that the plaintiffs required it for the purpose of reselling it in the course of their business for use as food for cattle; that the defendants sold the goods under the name "linseed cake"; that they so described it in the sale notes which constituted the statutory statement required by s. 1 of the Fertilisers and Feeding Stuffs Act, 1926 (1); that the defendants, notwithstanding any contract or notice to the contrary, thereby impliedly warranted, pursuant to s. 2 of the Act, that it was free from castor seed, that it was suitable for use as food for cattle, and that it was in accordance with the definition of linseed cake in the second column of Schedule IV. to the Act. The plaintiffs further said that it was an implied condition or warranty that the cake was of merchantable quality.

The plaintiffs paid the defendants for the cake, and in the course of their business resold portions of it to their customers as food for cattle, and on the same warranties. It then appeared that portions of the cake contained castor seed, a constituent which is injurious to cattle; and in fact cattle which were fed on some of it died, and others became ill as the result of eating it. Claims were thereupon made upon the plaintiffs by their customers in respect of the damage so caused, and the plaintiffs now claimed damages from the defendants, including the amount of damages for which the plaintiffs had become liable to their customers.

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(1) Sect. 1 of the Fertilisers and Feeding Stuffs Act, 1926, requires every person who sells for use (inter alia) as food for cattle any article included in the first column of the First or Second Schedule to the Act (and linseed cakes are so included) to give the purchaser a statement in writing (thereinafter referred to as a "statutory statement") containing the following particulars—the name under which the article is sold; and particulars of the nature, substance, or quality of the article.

Sect. 2, sub-s. 1, provides that the statutory statement is to have effect as a written warranty by the seller that the particulars set out therein are correct, notwithstanding any contract or notice to the contrary.

Sect. 2, sub-s. 2: "On the sale for use as food for cattle or poultry of an article included in the first column of the First or Second Schedule to this Act there shall be implied, notwithstanding any contract or notice to the contrary, a warranty by the seller that the article is suitable to be used as such, and does not, except as otherwise expressly stated in the statutory statement, contain any ingredient included in the Third Schedule to this Act."

In Schedule IV. to the Act "linseed cakes" are defined as "the residue resulting from the removal of oil from commercially pure linseed," and at the end of that Schedule is the following paragraph: "In the case of every article mentioned in this Schedule the definition of which includes the expression 'commercially pure' it is implied that no other matter may be added."

By their defence the defendants said that they acted in the sale of the cake as the agents of the National Bank of India, Ld., and were by reason thereof not liable to the plaintiffs. Further, they denied that they sold the cake for use as food for cattle, or that there was any warranty as alleged or at all. Alternatively, they said that the goods were sold on behalf of the bank and to satisfy the bank's lien, and the defendants accordingly relied on s. 24 of the Fertilisers and Feeding Stuffs Act, 1926 (1), if that Act applied, which they denied. They denied the alleged implied condition or warranty of merchantable quality.

By a memorandum of agreed facts and particulars, it was agreed by the plaintiffs that in fact as between the defendants and the National Bank of India the defendants were acting under the instructions and on behalf of the bank. It was agreed by the defendants that they had been properly sued; that if the alleged statutory warranties applied under the Act of 1926 there was a breach thereof by the defendants and some damages resulted; and that the National Bank of India were holders in due course of certain bills of exchange on which one N. W. Velmohamed was liable to the bank, and in respect of such liability the bank had a lien on the goods in question and the sale was to satisfy the lien.

Roche J. found that the defendants did all that they could do, apart from the Act of 1926, to disclaim responsibility with respect to the cake, but he held that there was a breach of warranty; that they were not protected by s. 24 of the Act,

(1) Fertilisers and Feeding Stuffs Act, 1926, s. 24: "This Act shall not apply to the sale of an article used . . . . as a food for cattle or poultry where the sale is in exercise of a statutory power to enforce a right or to satisfy a claim or lien, or where the sale is made by a sheriff, bailiff, or other officer to satisfy a writ of execution, or warrant or decree of any court, or a distress for rent or warrant of distress."

as the scope of that section was to exempt only those persons who were not ordinarily dealing in the particular commodity and who were merely carrying out forced sales to satisfy a claim or lien, which was not being done in this case. Accordingly, the plaintiffs were entitled to damages but these were limited to the difference in value between sound cake and cake containing castor, and could not include sums for which the plaintiffs might reasonably and properly become liable to those to whom they resold the cake. He disallowed the latter claim, because in his opinion the terms of the sale notes ought to have put the plaintiffs on inquiry, and therefore they should not have resold without further analysis.

The plaintiffs appealed, and the defendants cross-appealed.

Porter K.C. and *Howard-Jones* for the appellants (plaintiffs). The sale of the linseed cake to the appellants was a sale of feeding stuff for the use of cattle within the meaning of the Fertilisers and Feeding Stuffs Act, 1926, and that being so the statutory warranty that it was fit for that use applies. In fact the linseed cake was not fit for feeding cattle, and in consequence of the breach of warranty the appellants have suffered damage in respect of which they are entitled to recover. It was a direct result of the breach of warranty that the appellants became liable to purchasers from them. Roche J. was therefore wrong in limiting the amount of damages to the difference in value between sound and unsound linseed cake. Sect. 24, which exempts from the application of the Act a sale in exercise of a statutory power to enforce a right or to satisfy a claim or lien, or a sale made by a sheriff, bailiff or other officer to satisfy a writ of execution, etc., does not assist the respondents inasmuch as it applies only where the sale is in exercise of a statutory power or lien. The sale in the present case did not come within that description. Moreover, the respondents sold as principals.

du Parcq K.C. and *van den Berg* for the respondents (appellants in the cross-appeal). The onus is on the appellants to show that the linseed cake in question was sold for use as food for cattle, and they have failed to discharge that onus. The cake was sold for what it was. The respondents did all they could to disclaim responsibility for its fitness, and therefore they cannot be held to have given a warranty of fitness for use as cattle food. If, as might easily be the case, a person sells linseed cake to another for exhibition, and afterwards the purchaser uses it for cattle food, the seller clearly could not be made liable under the Act if it was ascertained to be unfit for that purpose.

Secondly, s. 24 of the Act protects the respondents, as they sold to satisfy the lien of the bank. The case comes clearly within the language of the section—" to satisfy a claim or lien "—and there is no warrant for the contention that the word " statutory " governs the words quoted.

Thirdly, Roche J. was right in holding that in any event the respondents were not liable for what are called chain damages. Even if it be assumed that the goods were to be passed on to buyers from the appellants, how can it be said that the respondents are liable for each set of damages ? The particular circumstances of the sale have to be taken into account—see per Lord Esher M.R. in *Hammond* v. *Bussey* (1)—to ascertain what can be reasonably said to have been in the contemplation of the parties. The very fact that the respondents disclaimed responsibility for the analysis put the appellants upon inquiry and in effect warned them not to resell without satisfying themselves that the cake was castor free.

Porter K.C. in reply. All the circumstances of the sale point to its having been one of a sale of the linseed for use as cattle food, and therefore the statutory warranty applied. With regard to damages, these are those likely to ensue on a resale. Here the respondents must have contemplated that the goods would be sold by the appellants, seeing that the latter are merchants and not farmers, and that the result of the warranty being broken would be that cattle eating the cake containing castor would be poisoned. There was no obligation on the appellants to make a further analysis.

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(1) (1887) 20 Q. B. D. 79, 89.

[*Hadley* v. *Baxendale* (1); *Mowbray* v. *Merryweather* (2); *Pinnock Bros.* v. *Lewis & Peat, Ld.* (3); and *British Oil and Cake Co.* v. *Burstall & Co.* (4) were also cited.]

Cur. adv. vult.

1930. Nov. 17. The following judgments were read:—

Scrutton L.J. This appeal from Roche J., arising out of two sales of two parcels of linseed cake of about 100 tons each, raises questions very important to vendors and purchasers of cattle food, and to banks advancing money on parcels of cattle food, now that the sale of feeding stuffs for cattle is regulated by the Fertilisers and Feeding Stuffs Act, 1926, and contracting out of that Act is forbidden by statute.

It seems that no difficulties arise on the sale of linseed cake from North or South America, but that imports from India, especially Bombay, are frequently found to be contaminated by castor seed which is poisonous to cattle. This is attributed by the witnesses to carelessness of the native workmen in cleaning the presses, by reason of which it may happen that a press used for castor seeds has not been efficiently cleaned before being used for linseed, with the result that some of the linseed gets castor seed crushed with it. As only part of the press may be dirty, and as that part may be cleaned by the first pressing of linseed, the linseed shipment will not have any uniform percentage of castor; a number of bags may have no castor, and then there may come a packet of 40 or 50 bags heavily impregnated with castor. Sampling, even if mixed in the usual way from 10 per cent. of the bags, cannot therefore be very reliable, and the dangers of selling Indian linseed from the possibility of castor being in some parts of it are well known in the Liverpool trade. Linseed cake is only used as food for cattle in some shape or form, either as "straight" cake, or meal ground from cake, or manufactured cake from the original cake. The plaintiffs, Messrs. Dobell, are merchants having no cattle of their own, who sell linseed cake to dealers, who sell it to farmers who feed their cattle with it. Messrs. Barber & Garratt are dealers and brokers, who had, under circumstances to be referred to, taken certain parcels of Bombay linseed cake for sale. Having had an interview with Dobells, Messrs. Barber wrote on August 27 this letter: "Confirming conversation with Mr. Benson, we append a list of all the Bombay linseed cakes with the exception of 'Rotary,' which we have in store Liverpool, and which show free from castor seed. The analyses mentioned are given in good faith but we cannot accept any responsibility for them, and should you wish to sample and inspect the parcels yourselves, sampling order is available on application." The analyses in question are by a reputable firm and state: "Castor seed none." The samples analysed appear to have been mixed from 10 per cent. of the bags—i.e., 132 out of 1324 in the case of the *City of York*; 143 out of 1435 in the case of the *Elysia*. Messrs. Dobell later took a sample of their own ex warehouse, but did not analyse it. On September 12, Barbers sent in two sold notes not signed as agents but representing themselves as principals—one for the *Elysia* and one for the *City of York*. The material terms of these were as follows: "We have this day sold to you the following goods. . . . . Balance, estimated at about 98 tons 'Expeller' linseed cake (ex s.s. *City of York* at 11*l*. 17*s*. 6*d*. per ton in bags, gross re-weights, ex store Liverpool. Bulk approved. The cake is sold 'tel quel' in all respects but Ormerod & Fowweather's analysis, for which sellers accept no responsibility, is: 8·93% oil; 29·22% albuminoids, castor free."

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(1) (1854) 9 Ex. 341.

(2) [1895] 2 Q. B. 640.

(3) [1923] 1 K. B. 690.

(4) (1923) 39 Times L. R. 406.

Dobells had bought these goods to fulfil contracts already made for sale to dealers and made deliveries to their purchasers. In December the dealers began to complain that their customers were finding castor in the cake, and Dobells stopped any further deliveries. These customers made claims on them and Dobells made claims on Barbers, issuing a writ to ascertain if there was liability and, if so, the measure of damages. Meanwhile the two parties jointly dealt with the purchasers' claims.

Roche J. has held that Barbers are liable in damages to Dobells, but that the measure is the difference in value between sound cake and castored cake, and does not include the claims of purchasers from Dobells for damages and costs. Barbers, as vendors, appeal against the decision that they are liable; Dobells, as purchasers from Barbers, appeal against the measure of damages in that it excludes the claims of sub-purchasers from Dobells for damages and costs against Dobells.

If there were no Fertilisers and Feeding Stuffs Act, 1926, in my opinion the wording of the contract would protect the sellers from any warranty. There might however be a question such as that raised in the sainfoin case—*Wallis, Son & Wells* v. *Pratt & Haynes* (1)—whether the stuff delivered, linseed cake plus castor, was the stuff contracted to be sold, linseed cake. But Dobells intentionally do not raise that point, in order to obtain a decision on the true meaning of the Act of 1926. That Act, which follows Acts of 1893 and 1906 which did not prohibit contracting out, expressly provides in s. 2, sub-s. 2, that the warranty to be implied on a sale for use as food for cattle—namely, that the article is suitable to be used as such shall be implied "notwithstanding any contract or notice to the contrary." This in my opinion prevents the sale "tel quel" or the refusal of responsibility for the analysis, from having any legal effect in defeating the implied warranty. Indeed, if the sellers, Barbers, are not responsible for the quantities of oil and albuminoids stated in the analysis and contract, they have not complied with the obligations as to statutory statement contained in s. 1 of the Act. Sect. 2, sub-s. 1, overrides the refusal of responsibility for those matters. There is however no statutory obligation to make a specific statement as to quantity of castor.

The vendors say, first, they are not liable at all, because they have not sold "for use as food for cattle." They say this, first, because their purchasers have no cattle and did not themselves intend to feed cattle with the cake purchased, and secondly, because their contract, in their view, repudiates any liability if the cake is not suitable as food for cattle. On this second point, I do not think they correctly appreciate the effect of the provision against contracting out. If the stuff sold is stuff which can only be used as food for cattle, and the purchaser intends to devote it to its only possible use, I do not think it is of any avail for the seller to say: "I am not selling for use as food for cattle." He is relying on a notice to defeat the statutory warranty implied, which the Act forbids him to do. If he sells a substance the only use of which is cattle food he cannot escape the statutory liability.

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(1) [1911] A. C. 394.

As to the first defence, the Acts have generally used the phrase "sale for use as food for cattle," but have sometimes substituted the phrase "sale of an article used as food for cattle"—Act of 1926, s. 24; Act of 1906, s. 3; Act of 1893, s. 5—which I think must mean "ordinarily so used," as you cannot sell an article after it has been used or consumed. In my opinion the expressions cover any sale of an article whose only use is cattle food, and whose purchaser intends it to be devoted to that use, though he himself does not feed cattle but only sells to those who do feed their cattle. As pointed out by Roche J., the contrary view would limit the operation of the Act to the last sale by dealer to farmer, and would exclude the large dealers and brokers who buy only to sell from the operation of the statutory warranty. I agree with the judgment of Roche J. on this point. But I would add that there are articles in the Schedule to the Act which have a double use, where it must be proved for what use they were sold. An obvious instance is "treacle," which when sold by the grocer for roly-polies does not involve this particular statutory warranty.

The second point taken by the vendors is more difficult. They allege that they are protected from liability by s. 24 of the Act of 1926, which says: "This Act shall not apply to the sale of an article used as a fertiliser of the soil or as a food for cattle or poultry where the sale is in exercise of a statutory power to enforce a right or to satisfy a claim or lien, or where the sale is made by a sheriff, bailiff, or other officer to satisfy a writ of execution, or warrant or decree of any court, or a distress for rent or warrant of distress." Messrs. Barbers have signed the contract as principals, with no limitation of liability "as agents." They were in fact acting for the National Bank of India. This bank had in India discounted bills for the price of linseed cake drawn by one Velmohamed on Messrs. Barbers with documents attached. The bills had not been accepted on the ground that they were drawn without authority. The bank had then presented the bills of lading to the ship, paid the freight and obtained possession of the goods which they had warehoused with Messrs. Barbers. The bank's position then was that they were pledgees of the goods, Velmohamed having the general and the bank the special property, and the bank having a power of sale as pledgees after reasonable notice: see per Lord Sumner in *The Orteric* (1) and the description of such transactions in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (2) The parties have agreed that "the bank were holders in due course of bills of exchange on which Velmohamed was liable to the bank and in respect of such liability the bank had a lien." With respect to the eminent persons who agreed this, I think it is not accurate. The drawer was not liable to the bank "on the bills," but to repay the bank's advance to him, a security for which was the "bills with documents attached," of which the bank was a pledgee having special property with a power of sale. The bank had not a lien; Messrs. Barbers may have had, but were not selling under their lien, but under the power of sale and instructions of the bank. The bank's power of sale was not statutory. The bank's letter to Barber of July 12 shows that Velmohamed had been consulted and had authorized the sale; any surplus over the bank's claim would belong to him, and he was clearly not selling to "enforce any claim." Barbers, though they did not disclose it, were selling on the joint authority of Velmohamed and the bank.

What is the application of s. 24 to these facts? The latter part of the section appears to be intended to protect persons

(1) [1920] A. C. 724, 733.

(2) [1918] 2 K. B. 623, 659–661.

who have statutory duties to perform in protecting the rights of others, but who are not otherwise interested in the sale, sheriffs or bailiffs. I have come to the conclusion that the former part of the section has the same object. For instance, Part VII. of the Merchant Shipping Act, 1894, especially s. 497 requires and empowers warehousemen and wharfingers to sell perishable goods in their charge in aid of the shipowner's lien for freight. Many Dock Acts impose similar duties on dock companies, for instance, the London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), s. 107, and also the Port of London Act, 1908, s. 13, sub-s. 4, and other Acts. I am of opinion that the word "statutory" applies to the whole of the first part of the section; that the section is drawn to protect persons who are only selling to comply with their statutory duties and to protect their statutory rights, and have no commercial interest in the sale. Messrs. Barbers did not sell under any statutory powers or duties, and there was no disclosure to the purchasers that the bank was selling, or claiming to sell under the protection of s. 24. If it had been disclosed that the sale was a forced one, a lower price would probably have been obtained. In my opinion if the vendors, disclosed or undisclosed, want the protection of s. 24 they must disclose their position. The sale was, as appears from the letter of July 12, "as arranged with Velmohamed" to protect his general property, and he certainly did not come within s. 24. It would be startling to think that the Indian vendor and importer could escape from giving the statutory warranty. I agree with Roche J. that this defence fails. The cross-appeal of the defendants, Barbers, against liability must therefore be dismissed with costs.

There remains the appeal of the plaintiffs as to the measure of damages. Roche J. in *Pinnock's* case (1) allowed the purchasers the damages and costs involved in proceedings by their sub-purchasers. In the present case he only allowed the difference in value between the linseed cake delivered and sound linseed cake, I gather on the ground that the terms

(1) [1923] 1 K. B. 690.

of the contract and of the reference to the analysis ought to have put the purchasers on inquiry and further analysis, and if they sold without any further inquiry, the damage by claims by purchasers resulted from their own unreasonable conduct and was too remote a consequence of the original breach of warranty. The legal ground for such claims is contained in the well known case of *Hammond* v. *Bussey.* (1) The sale there was of steam coal to a person who did not own steamers, but sold to persons who did. The purchaser was allowed the damages for supplying coal unfit for use in steamships, and costs paid to steamship owners. The Court of Appeal rested the liability on the second branch of the rule in *Hadley* v. *Baxendale.* (2) In *Hammond* v. *Bussey* (1) Lord Esher says (3): "The rule goes on to state what the measure of damages is where there are special circumstances, as follows: 'or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'" Lord Esher says also (4): "It seems to me clear that the rule would apply to the case of a sub-contract which within the knowledge of the defendant was in the ordinary course of business sure to be made." These words seem to me exactly to describe the relations between Dobells and Barbers. Dobells bought to sell and Barbers knew it. I do not think Barbers are entitled to say that Dobells should have taken further steps before selling. Dobells have a statutory warranty on which they are entitled to rely, and a statutory authority for disregarding any contract or notice to the contrary, and an analysis of goods by a responsible firm "castor free." Though Barbers say they accept no responsibility for the analysis, it is their only way of fulfilling their statutory obligation to give a correct statement as to oil and albuminoids in the parcel. In my opinion Messrs. Dobells were entitled to rely on their statutory warranty, and Parliament intended that this should be so. Parliament intended the vendor of cattle food to take the responsibility of

(1) 20 Q. B. D. 79.
(2) 9 Ex. 341.
(3) 20 Q. B. D. 88.
(4) Ibid. 89.

its fitness for that purpose. If he wished to escape responsibility he should not sell food only used for that purpose. If banks wish to avoid a similar responsibility they should not make advances on Indian linseed cake, until the Indian vendors have learned to take more care in its preparation.

In my opinion the appeal of the plaintiffs should be allowed and the judgment of Roche J. varied by directing that the damages should be assessed on the footing that the plaintiffs were entitled to include in their damages the damages and costs reasonably incurred in claims by their sub-purchasers for breach of their statutory warranty. The plaintiffs must have the costs of the appeal.

Lawrence L.J. These appeals raise questions of general importance to sellers and buyers of feeding stuffs for cattle and poultry.

The first question which falls for determination is the true meaning of the expression "the sale for use as food for cattle or poultry" in s. 2, sub-s. 2, of the Fertilisers and Feeding Stuffs Act, 1926. The defendants contended that the effect of this expression is to confine the application of the sub-section to sales to persons (such as farmers) who intend themselves to use the article for feeding cattle or poultry, and that the sub-section has no application to sales to persons (such as merchants) who intend to resell the article. Roche J. has in my opinion rightly rejected this contention. A study of the Act has convinced me that the expression in question was not intended to bear any such limited interpretation. Sect. 1 (which obliges sellers to furnish statutory statements) was clearly intended to apply to sales of large quantities such as would ordinarily be bought by merchants for resale (see para. ii. of the proviso). Sects. 4 to 10 (which deal with criminal liabilities) unmistakably point to their applicability to sales to persons buying for the purpose of resale; in particular s. 7, sub-s. 1 (*b*), assumes that where a person selling has bought from another person the seller will have received a statutory statement from the person from whom he has bought. The same assumption is made in s. 20, sub-s. 2 (*b*), which deals with legal proceedings. Sects. 11 to 18 (which deal with administrative provisions) point to the same conclusion; in particular s. 12, sub-s. 4, contains a special provision applicable to sales of small quantities by retailers.

Having regard to the scope of the Act as a whole I am clearly of opinion that, according to the true interpretation of the expression in question the use referred to is not the use to which the immediate buyer is intending to put the article but is the use to which the article is intended ultimately to be put, being the use for which it is manufactured and which gives it its merchantable quality and commercial value.

The necessity of referring to the use for which the article is sold arises from the fact that some of the articles mentioned in the first column of the First and Second Schedules to the Act may, in addition to being sold for use as food for cattle or poultry, be sold for use as fertilisers (e.g., bone meal) or for use as food for human beings (e.g., treacle) or for use in other ways, and that it is only where the article is sold for use as food for cattle or poultry that the warranty referred to in the sub-section is to be implied.

The next question is whether as a matter of fact the linseed cake in question in the present case was sold by the defendants for use as food for cattle. The learned judge has held that it was sold for that use and on this point I also find myself in complete agreement with the learned judge. Linseed cake is one of the articles included in the first column of Part II. of Schedule I. under the heading of "Feeding Stuffs"; it is not mentioned in Part I. of the Schedule and the evidence is that it has no manurial value and that its only use is as food for cattle. In the contracts in the present case the article sold is described as "Linseed Cake" and consequently under s. 2, sub-s. 3, and Part II. of Schedule IV. of the Act the sale has effect as a written warranty that it consists of the residue resulting from the removal of oil from commercially pure linseed, the latter expression implying that no other matter has been added.

The grounds put forward by the defendants for their contention that the cake was not sold by them for use as food for cattle are that it came from Bombay and that to the knowledge of the plaintiffs linseed cake imported from India is liable to contain an admixture of castor seed, because in that country it not infrequently happens that linseed and castor seed are pressed in the same presses, and that having this fact in mind the defendants sold the cake "tel quel" and stated that they would not accept any responsibility for the analyses which they had caused to be made.

As against this, however, it is to be noted that the defendants, who are merchants of feeding stuffs for cattle, sold the cake to the plaintiffs, whom they knew to be merchants of such feeding stuffs by the description of "Linseed Cake" and stated that the analyses (which had been made by certain well known named analysts) were given in good faith and showed the cake to be "castor free." This is tantamount to saying: "We honestly believe that the cake is suitable for use as cattle food but we do not give any warranty to that effect."

In these circumstances I am clearly of opinion that, notwithstanding the attempt made by the defendants to avoid the consequences of the warranty implied under the Act, they sold the cake for use as food for cattle and for no other use.

The next question is whether the sale in the present case was exempted from the operation of the Act by virtue of the provisions of s. 24.

The defendants contended that it was so exempted because the sale was in fact a sale by the bank under their power of sale as pledgees of the cake and not a sale by the defendants as merchants. Here again I agree with the decision of the learned judge that it was not so exempted.

In the first place, the defendants sold as principals without disclosing the fact that they were acting for the bank. By so doing they, in my opinion, subjected themselves to the obligations imposed by the Act on every merchant of feeding stuffs. It would be an extraordinary thing if such a merchant could effect a sale apparently in the ordinary course of his business, thereby not only inducing the buyer to pay a better price than he would have paid if he had known that it was a forced sale but also inducing him to rely upon the statutory warranty, and then when the buyer sought to enforce that warranty could confront him with the defence that he (the seller) had sold on behalf of a bank or some other body or person who had a claim or lien and that therefore there was no warranty at all. That cannot be right. In my judgment the defendants in the circumstances of this case were not selling to satisfy any claim or lien within the meaning of s. 24 (however widely that expression may be interpreted) but must be taken to have been selling as merchants in the ordinary course of their business.

But even if that view be wrong and the sale ought to be regarded as a sale by the bank under their power of sale, I am still of opinion that it does not come under any of the exemptions mentioned in s. 24.

Sect. 24 is perhaps not very happily worded, but I think that the better, and indeed the strict grammatical, construction is that the sales thereby exempted fall into two main categories and no more, the first category comprising sales in exercise of a statutory power either (*a*) for the purpose of enforcing a right, or (*b*) for the purpose of satisfying a claim or lien; and the second category comprising sales by a sheriff, bailiff, or other officer for the purpose of satisfying a writ of execution or warrant or decree of any Court or a distress for rent or warrant of distress. The defendants' contention that there are three classes of sales which are exempted by the section—namely, (1.) sales in exercise of a statutory power to enforce a right; (2.) sales to satisfy a claim or lien; and (3.) sales by a sheriff, etc., is in my opinion negatived not only by the structure of the sentence under consideration but also by the fact that the sales in the third class are all sales to satisfy a claim. Moreover, it is hardly conceivable that it was the intention of the Legislature to exempt every sale made to satisfy a claim or lien. Such an extremely wide and vague exemption would offer an easy method of escape from the stringent provisions of the Act. The more reasonable and, in my opinion, the proper way of construing the language of the section is that the first category of exempted sales is limited to sales made by bodies and persons (such as dock undertakings, warehousemen, and wharfingers) on whom Parliament has imposed certain duties and has conferred corresponding powers, and that the second category of exempted sales is limited to sales by sheriffs, bailiffs and officers who have merely ministerial functions to perform ; both categories being confined to sales in exercise of duties imposed on persons who, apart from those duties, have no commercial or other interest in the article sold. Even if I am wrong in placing such a limited meaning upon the statutory powers referred to in the section and they ought to be held to include such powers as the power conferred on an unpaid seller by s. 48 of the Sale of Goods Act, 1893, it would not avail the defendants, as the bank was not selling under any such power or under any other power which could be called " statutory."

There remains the more difficult question of the measure of damages, and here I part company for the first time with the learned judge.

The learned judge has rightly held that by virtue of s. 2, sub-s. 2, the defendants must be taken to have warranted that the cake was suitable to be used as food for cattle notwithstanding that they sold " tel quel " and disclaimed responsibility for the accuracy of the analyses.

The sale " tel quel " and the disclaimer were in truth nothing more than a futile attempt on the part of the defendants to avoid or limit their liability under the statutory warranty. The learned judge, however, has held that because of the precautions taken by the defendants and because the plaintiffs knew that Indian linseed in general was liable to contain castor seed (although they had no suspicion that this particular parcel contained any) the plaintiffs were not justified in selling it as food for cattle without first subjecting it to further analysis, and by so doing they broke the chain of causation and cannot recover the amount of the damages which they have been obliged to pay to their sub-purchasers.

With the greatest respect for the opinion of the learned judge I do not agree with that view of the plaintiffs' rights.

In my opinion the warranty implied by virtue of s. 2, sub-s. 2, of the Act has the same force and effect as an express warranty, notwithstanding any notice or contract to the contrary. It is clear, and not disputed, that if the defendants had not sold "tel quel" and had not disclaimed responsibility for the analyses and had expressly warranted the cake as fit for cattle food they would have been liable for the amount of damages which the plaintiffs have had to pay to their sub-purchasers.

The defendants knew that the plaintiffs either had made or would make sub-contracts in the ordinary course of their business, and therefore (apart from the attempt made by the defendants to safeguard themselves) the damages which the plaintiffs had to pay to their sub-purchasers were such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of it, within the rule laid down in *Hadley* v. *Baxendale* (1), as explained and applied by Lord Esher M.R. in *Hammond* v. *Bussey*. (2)

In my opinion the futile attempt made by the defendants to avoid or limit their liability under the statutory warranty does not place them in any better position. Such an attempt was, in virtue of the express words in s. 2, sub-s. 2, a nullity and ought to be disregarded. Were it otherwise, the effect of the provision in the Act that the warranty was to be implied "notwithstanding any notice or contract to the contrary" would be seriously curtailed and the seller could always protect himself against the full consequences naturally flowing from the warranty by stating that he did not accept the responsibility which the Act casts upon him. Whether or not the plaintiffs in the circumstances of this case could successfully avoid criminal liability under s. 7 of the Act for reselling without making a fresh analysis seems to me to be

(1) 9 Ex. 341. (2) 20 Q. B. D. 79.

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beside the question which we have to determine on this appeal, as in my opinion it does not lie in the mouth of the defendants (who must be deemed to have given the statutory warranty) to raise such a defence.

Although the plaintiffs were in my opinion under no duty to the defendants to procure a further analysis to be made before selling and delivering the cake to their sub-purchasers they obviously could not after they had received notice that the cake was unfit for cattle food increase the damages by delivering any more of the cake. As a matter of fact, immediately on receiving a notice to that effect, they stopped all deliveries. As regards the damages which they had to pay to their sub-purchasers in respect of the cake sold and delivered in good faith I am of opinion that they were entitled to rely upon the statutory warranty and can recover such damages.

In the result I agree with Scrutton L.J. that the appeal of the plaintiffs ought to be allowed with costs and that the cross-appeal of the defendants ought to be dismissed with costs. The order of the learned judge should be varied as indicated by my Lord.

GREER L.J. These appeals raise three interesting and difficult questions relating to the meaning and effect of certain sections of the Fertilisers and Feeding Stuffs Act, 1926.

The appellants Messrs. Dobell (hereinafter referred to as "the buyers") bought from the respondents Messrs. Barber & Garratt, who are appellants in the cross-appeal (hereinafter called "the sellers"), by two contracts in writing dated September 12, 1929, 98 tons and 107 tons of linseed cake which had been shipped from Bombay to Liverpool. The sellers were acting in the matter as agents for the National Bank of India to whom the goods had been hypothecated as security for certain bills of exchange which had been refused acceptance by the drawees. They did not disclose the fact that they were acting as agents for the bank, but sold in their own name; the buyers were therefore entitled to sue the sellers as parties to the contract of sale. The sale was none the less a sale by the bank, and the bank could have been sued for breach of contract if the buyers had ascertained that the sale was made on their instructions and exercised the option the law gave them of holding the principals liable. It was well known to both buyers and sellers that linseed cake from Bombay frequently contains some castor seed which makes it poisonous and unfit for use as food for cattle. Before the terms of sale were agreed the parties met, and a conversation took place which, as Roche J. has found, is accurately stated in a letter from sellers to buyers dated August 27, 1929, which reads as follows: "Linseed cakes ex store. Confirming conversation with Mr. Benson, we append a list of all the Bombay linseed cakes with the exception of 'Rotary,' which we have in store Liverpool, and which show free from castor seed. The analyses mentioned are given in good faith but we cannot accept any responsibility for them, and should you wish to sample and inspect the parcels yourselves, sampling order is available on application." The contracts of September 12 each contain the following words: "Bulk approved. The cake is sold 'tel quel' in all respects but Ormerod & Fowweather's analysis, for which sellers accept no responsibility is: 8·93 per cent. oil, 29·22 per cent. albuminoids. Castor-free."

By reason of the provisions of the Fertilisers and Feeding Stuffs Act, 1926, the sellers, if the sale was a sale for use as food for cattle, could not by any notice they gave escape being bound by a warranty that the linseed cake was suitable to be used as food for cattle: see s. 2, sub-s. 2. If the conversation mentioned above and the special terms of the contract have any effect in law, this can only be either (1.) as negativing a sale "for use as food for cattle," or (2.) as relevant to the question of the amount of damages recoverable under the circumstances of the case.

Some of the goods were in due course delivered, and after resale came into the hands of persons who used them for cattle food, with the result that cattle eating the linseed cake were made ill thereby. It was then discovered by analysis that some of the cake was contaminated by castor seed.

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When the buyers resold the goods they described them as "Screw press linseed cake," but gave no warning to their buyers similar to that which was given to them by the sellers. It does not appear whether the sub-buyers knew they were buying Bombay linseed cake, or that they knew of the doubtful reputation of Bombay linseed cake. The parties agreed certain facts for the purposes of the trial. These are conveniently set out in a memorandum in the bundle of pleadings, which reads as follows: "Memorandum of agreed facts admissions and particulars: 1. By the plaintiffs: (*a*) That in fact as between the defendants and the National Bank of India, Limited, the defendants were acting under the instructions and on behalf of the bank. 2. By the defendants: (*a*) That the defendants have been properly sued. (*b*) That if the alleged statutory warranties apply under the Fertilisers and Feeding Stuffs Act, 1926, there was a breach thereof by the defendants and some damages resulted. (*c*) Under paragraph 4 of the defence that the words 'inter alia' were inserted as a matter of general precaution. (*d*) That the National Bank of India, Limited, were holders in due course for certain bills of exchange on which one N. W. Velmohamed was liable to the bank and in respect of such liability the bank had a lien on the goods in question and the sale was to satisfy this lien."

The buyers brought this action for a declaration that they were entitled to damages for breach of the statutory warranty, and for breach of certain alleged implied warranties apart from the statute. At the trial and at the hearing of the appeal they based their claim entirely on the statutory warranty. At the trial they asked the judge to give directions with regard to the damages recoverable. The case was heard by Roche J., who decided in favour of the buyers on the question of liability, but declared that the damages recoverable were to be limited to the difference between the value of the linseed cake as delivered and the market value of cake free from castor.

On the appeal and cross-appeal three questions arose for decision: (1.) Was the sale under all the circumstances a sale "for use as food for cattle" within the meaning of s. 2, sub-s. 2, of the relevant statute (hereinafter called "the Act")? (2.) If the sale would otherwise have been within the Act, was it taken out of the Act by the provisions of s. 24? (3.) Are the buyers entitled to recover merely the difference in value as held by the learned judge, or are they entitled to the consequential damages they have been or will be called upon to pay to their buyers?

First, it is of course clear from the words of s. 2, sub-s. 2, of the Act that the seller cannot escape from the obligation to give the statutory warranty by saying "I do not warrant," or using any words to that effect. I do not think the section means that every sale of any of the articles mentioned in the first columns of the First and Second Schedules must be treated as a sale for use as food for cattle or poultry. Some of the articles there mentioned are useful for other purposes, for example, treacle or molasses. Linseed cake, according to the evidence, is only used as food for cattle, but it might be expressly said by seller to buyer: "This parcel contains castor seed and in its present state it is unfit for use as cattle food, but I am prepared to sell it to you as material to be mixed with other material so as to make it fit for use as cattle food." The sale would not then in my opinion be a sale for use as food for cattle. But the evidence in this case falls far short of that. The sellers knew that the buyers bought linseed cake to sell it in, what for convenience I may call, the cattle food market. They therefore knew that the buyers were buying the cake to resell for use as cattle food, and expected so to sell it in its existing state. I do not think they can say that a warning that its suitability for cattle food was doubtful, entitles them to say they were not selling the cake for use as food for cattle within the meaning of the Act. They knew it was going into the cattle food market, and with that knowledge they sold it. I think the terms of the contract, and the conversation, merely show that as the suitability of the linseed cake was doubtful, the sellers desired if they could to avoid any warranty that it was so fit. This is the very thing the Act prohibits them from doing. I

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therefore agree with the learned judge that the sale was subject to the statutory warranty.

Secondly, the question whether the sale was within the exemptions contained in s. 24 of the Act is a more difficult question. The wording of s. 24 is as follows: "This Act shall not apply to the sale of an article used as a fertiliser of the soil or as a food for cattle or poultry where the sale is in exercise of a statutory power to enforce a right or to satisfy a claim or lien, or where the sale is made by a sheriff, bailiff, or other officer to satisfy a writ of execution, or warrant or decree of any Court, or a distress for rent or warrant of distress." These words are capable of being read in two ways: (*a*) Where the sale is (1.) in exercise of a statutory power to enforce a right, or (2.) to satisfy a claim or lien, or (3.) where the sale is made by a sheriff, etc.; or (*b*) where the sale is in exercise of a statutory power (1.) to enforce a right, or (2.) to satisfy a claim or lien, or (3.) where the sale is made by a sheriff, etc. I think the section is fairly capable of either construction, and one must look beyond the mere words of the section to decide which is the right one.

The latter part of the section no doubt deals with sales by an officer of the Court, whose duty it is to sell not for his own purposes but to satisfy a legal claim by some one else. On the other hand, by the Sale of Goods Act, 1893, an unpaid seller has in certain events a right to sell the goods (see s. 48), and it would be an odd result of the statute if an unpaid seller, who would in most cases be a trader who had bought with the advantage of the statutory warranty provided for by s. 2 of the Act, was relieved from giving the statutory warranty, while a bank selling to give effect to its lien or pledge could only sell subject to the warranty. When s. 24 speaks of a statutory power to enforce a right, there is nothing in the words used to indicate that it is confined to power to enforce rights belonging to persons other than the seller. No doubt in some of the better known instances of statutory powers of sale, like the sale by a warehouseman under the Merchant Shipping Act, 1894, s. 497, the warehouseman is under a duty to sell in order to enforce the shipowner's claim to freight; but there are no words in the section limiting the words "statutory power to enforce a right" to power to enforce a right belonging to some one other than the seller. In the case of an unpaid vendor, the right to be satisfied is a right of the seller.

There are some considerations that lead me to the conclusion that s. 24 should be read in the first of the two ways stated above. I think the object of s. 24 was to exclude from the rigorous and penal provisions of the Act sellers who were not selling for profit as an incident of their trade, but who without any choice of their own, and without getting the benefit of any statutory or other warranty themselves, were put in a position in which they could only give effect to their rights by selling goods belonging to some one else in order to satisfy a claim whether by themselves, or by some third person other than the owner. Sect. 1 of the Act contemplates that the seller will be able to give certain particulars of the articles to be sold, and s. 2 imposes on him a warranty that the particulars are true. Sect. 7 makes it a crime to sell for use as cattle food any article containing any ingredient deleterious to cattle, unless the seller did not know, and could not with reasonable care know, that the article contained a deleterious ingredient, and proves that on demand he gave all the information in his power (inter alia) as to the statutory statement given to him.

By s. 8 if a person fails to give a statutory statement where required by the Act to do so, he is liable to a substantial fine.

These provisions are difficult to apply, and are certainly unjust if applied to the case of a seller who has not bought for sale, but who has to sell by reason of the default of some person on whom he has a claim. The Act would, of course, apply to a first seller, who might be the manufacturer or the importer who had bought in a foreign country. In such a case the seller would indeed be without the protection of a statutory warranty, but he would have had the opportunity of seeing that the article was properly manufactured, or in the case of an importer, of stipulating for a guarantee in his contract of purchase. Having regard to the scope of

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the Act and to its other provisions, I am of opinion that s. 24 does exempt from the Act the case of a sale by a bank holding a lien or pledge, the sale being made to satisfy its claim against a third party. Roche J. decided that the sellers were not protected, because they sold in their own name to buyers who were not informed they were selling for a principal. There is nothing in s. 24 to indicate that the protection only arises in cases in which the buyer has notice of the facts which give rise to the exemption. If in fact the sale be to enforce a lien or claim within the meaning of the section, it matters not whether the buyer knows it or not. Of course the facts relating to any particular sale might give rise to a contention that the seller was estopped from alleging that he sold for a principal who was selling to satisfy a claim or lien. But no such contention was put forward in the present case, and there has been no sufficient investigation of the facts to enable a case of estoppel to be established. If the section was intended to protect, amongst others, bankers selling to pay themselves advances on security of the goods, it would extend to sales by them in the recognized course of business, that is through a broker selling in his own name.

I have considered this question on the footing that the sale was a sale by the defendants on behalf of the bank to satisfy their "lien." In strictness the rights of the bank are not properly described by the word "lien," but this is immaterial. Having regard to the agreed statement of facts, we are not entitled to decide this case on the ground that the sale was a sale on behalf of the Indian shippers. The words used by the bank in their letter of July 12, 1929, referring to their having arranged with the Indian shippers that the sale should be left in the hands of the defendants, do not necessarily mean that the sale was anything more than a "sale to satisfy the lien." They may merely mean that as a matter of precaution the bank had ascertained that the shippers did not question the bank's right to sell through the defendants' agency. Before we could say that the defendants sold as agents for the Indian shippers, more evidence would be required than is furnished by the letter. In my opinion the Court must determine this case on the admitted fact that the sale was on behalf of the bank to satisfy their "lien." It was not contended by counsel for the buyers that the sale was anything but a sale on behalf of the bank. If it had been so contended, the sellers might have been able to negative the view that they were selling as agents for the shippers by producing the correspondence between the bank and the shippers. A pledgee or mortgagee selling to realize his security is not selling on behalf of the pledgor or mortgagor, though he may be accountable to the pledgor or mortgagor for the balance of the proceeds after discharging the debt. I do not think we are entitled to conclude that the agreed statement of facts is a fiction invented to enable the parties to obtain a decision they would not be entitled to on the true facts.

If the decision of this case depended on my judgment the appeal would be dismissed with costs on the ground that there should be no inquiry as to damages at all, and the cross-appeal would be allowed with costs.

The third question to be determined in this appeal is whether if the buyers, contrary to my view, be entitled to damages, the damages should be limited, as the trial judge limited them, to difference in value, or whether the buyers are entitled to a declaration that they recover as damages the amount they will have to pay by way of damages to their sub-purchasers.

I am not prepared to hold that the learned judge was wrong in deciding that the damages should be limited to difference in value. It seems to me that it was in all the circumstances of the case unreasonable for the buyers to resell the cake when they took deliveries from time to time, without taking a reasonable number of samples and having them analysed. They knew that Bombay cake was liable to contain castor, that analysis of samples taken from a large bulk could not be relied on as sufficient evidence that the whole bulk was free from castor, that of their own free will the sellers were not prepared to warrant the cake free from castor, that, so far as they could, the sellers disclaimed responsibility, and told the buyers to take their own samples. It was therefore, in my judgment, unreasonable for the buyers to sell the parts of the bulk of which they took delivery without further sampling and analysis, and they have failed to establish that, if they had so sampled and analysed, the presence of castor would not have been discovered, as it was when analyses were made at the instance of some of the later buyers. In these circumstances I think the damages should be limited to the prima facie damages mentioned in s. 53, sub-s. 3, of the Sale of Goods Act, 1893. The damages payable on the sub-sales are neither the natural nor the probable result of the breach, nor such as must be deemed to have been within the contemplation of the parties.

The cases relied on in argument by the buyers—*Mowbray* v. *Merryweather* (1); *Pinnock Bros.* v. *Lewis & Peat, Ld.* (2); and *British Oil and Cake Co.* v. *Burstall & Co.* (3)—do not, in my judgment, apply to the circumstances of the present case. In none of them had the buyer any reason to doubt or distrust the seller's warranty. Indeed, where the warranty is voluntarily undertaken by the seller, it seems unlikely that he would say anything to cause the buyer to think the warranty might be broken. A man who warrants the horse he is selling to be sound, is most unlikely to say to the buyer: "I warrant the horse sound, but mark you, I know not whether it be sound or not, you must exercise your own judgment." *Hammond* v. *Bussey* (4) and other cases are indeed concerned with implied warranties, but there were no facts which would amount to a warning not to trust the warranty alone. If the buyers had before resale ascertained that the linseed cake contained castor and was therefore unfit for cattle food, and had then sold it for use as cattle food, it seems to me quite clear that they would not have been entitled to say to the sellers: "The damages I have to pay are the result of your breach of warranty, you are bound to pay them to me." If these

(1) [1895] 2 Q. B. 640.
(2) [1923] 1 K. B. 690.
(3) 39 Times L. R. 406.
(4) 20 Q. B. D. 79.

facts were proved, the damages would neither be the natural nor the probable result of the breach, or such as would in the events that happened have been within the contemplation of the parties. I think the same consequences would follow if the buyers have reason to doubt the soundness of the goods and do not take the appropriate steps to resolve that doubt, before themselves warranting the soundness of the goods.

In my judgment the learned judge was right in limiting the damages as he did. On this ground also I think the appeal should be dismissed with costs.

Appeal allowed; cross-appeal dismissed.

Solicitors for appellants (plaintiffs): *P. F. Walker, for Weightman, Pedder & Co., Liverpool.*

Solicitors for respondents (defendants): *Sanderson, Lee & Co.*

J. S. H.

OWNER OF STEAMSHIP ISTROS *v.* F. W. DAHLSTROEM AND COMPANY.

1930
Nov. 5.

Shipping—Charterparty—Prosecution of Voyage "with Utmost Dispatch"—Owner only responsible for Delay "caused by personal act, or omission, or default of owners or their manager"—Failure of Captain to prosecute Voyage with utmost Dispatch—Delay not caused by personal Act, Omission or Default of Owner—Liability of Owner to Charterers—Effect of Exceptions Clause.

By a charterparty in the form known as the Baltic and White Sea Conference Uniform Time Charter it was agreed between the owner of a steamship and charterers that the steamship should be taken on time charter by the charterers on terms and conditions which included: "Clause 8: Captain to prosecute all voyages with utmost dispatch. . . . ." "Clause 10: . . . . Should steamer be driven into port, or to anchorage, by stress of weather . . . . causing detention to steamer, time so lost and expenses incurred shall be for charterers' account, even if caused through fault or want of due diligence by owners' servants." "Clause 12: Owners only to be responsible . . . . for delay during the currency of this charter . . . . if such delay . . . . has been caused by want of due diligence on the part of owners or their manager, in making steamer seaworthy and fitted for the voyage, or any other personal act, or omission, or default of owners or their manager. Owners not to be responsible in any other case, nor for damage or delay whatsoever and howsoever caused, even if caused by neglect or default by owners' servants."

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During a voyage under the charterparty the captain, owing to bad weather, put into three harbours or sheltering places. The charterers having alleged that the captain had failed to prosecute his voyage "with utmost dispatch" within clause 8 of the charterparty and having claimed an allowance of hire in respect of the delay, recourse was had to arbitration. The umpire found that there was nothing to justify the captain in putting into the harbours or sheltering places which he entered, that he had not prosecuted the voyage "with utmost dispatch" and that delay had been caused thereby, but that the delay had not been caused by any "personal act, or omission, or default" of the owner or his manager within clause 12. The award having been stated in the form of a special case:—

Held, that the owner was protected from liability for the delay by the provisions of clause 12 of the charterparty which, while not qualifying the duty to prosecute all voyages with utmost dispatch, placed on the captain by clause 8, afforded the owner a defence in such an action as the present.

Suzuki & Co., Ld. v. *T. Benyon & Co., Ld.* (1926) 31 Com. Cas. 183 considered.

AWARD stated in the form of a special case.

By a charterparty in the form known as the Baltic and White Sea Conference Uniform Time Charter, dated August 3, 1929, it was agreed between one Michael N. Fillinis, owner of the steamship *Istros*, and F. W. Dahlstroem & Co., of Hamburg, as charterers, that the steamship should be taken by the charterers on time charter for about four calendar months on the terms and conditions of the charterparty.

The charterparty provided (inter alia) as follows:—

"Clause 5. Charterers to pay as hire 1225*l.* per banker's cheque on London per 30 days. . . . .

"Clause 8. Captain to prosecute all voyages with utmost dispatch and to render customary assistance with ship's crew. . . . . If charterers have reason to be dissatisfied with the conduct of captain, officers or engineers, owners, on receiving particulars of the complaint, to promptly investigate same, and, if necessary and practicable, make a change in the appointments.

"Clause 10. In the event of loss of time caused by dry-docking or by other necessary measures to maintain the efficiency of steamer, or by deficiency of men or owners' stores, breakdown of machinery, damage to hull, or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service. Should steamer be driven into port, or to anchorage, by stress of weather, or in the event of steamer trading to shallow harbours, rivers, or ports with bars, or in case of accident to cargo, causing detention to steamer, time so lost and expenses incurred shall be for charterers' account, even if caused through fault or want of due diligence by owners' servants.

"Clause 12. Owners only to be responsible for delay in delivery of the steamer, or for delay during the currency of this charter, and for loss or damage to goods on board, if such delay or loss has been caused by want of due diligence on the part of owners or their manager, in making steamer seaworthy and fitted for the voyage, or any other personal act, or omission, or default of owners or their manager. Owners not to be responsible in any other case, nor for damage or delay whatsoever and howsoever caused, even if caused by neglect or default by owners' servants."

On December 24, 1929, during the currency of the charterparty, the *Istros* sailed from the Tyne with a cargo of coal, loaded on the orders of the charterers, for the port of Oran. The weather was very bad and the captain put in at the following harbours or sheltering places:

(*a*) On December 28, when the *Istros* was off Beachy Head, the captain bore up and put back to Margate Roads, where the ship lay from December 29 to 31.

(*b*) On January 1, 1930, the captain put in to Torbay, where the ship lay until January 6.

(*c*) On January 9 the captain put in to Corunna, where the ship lay until January 15.

The charterers alleged that the captain had failed to prosecute his voyage "with utmost dispatch" within clause 8 of the charterparty and that the consequent loss of time amounted to fifteen days. They claimed an allowance of 612*l*. 10*s*. in respect of the delay, that being fifteen days' hire at the charterparty rate.

The dispute having been referred to arbitration, the owner contended that, the weather being of the most tempestuous character, the captain was justified, as a prudent mariner, in putting into the ports and harbours of refuge mentioned. He further contended that, in view of the terms of clause 12 of the charterparty, he could not be held responsible for any delay whatsoever which was not due to any personal act, omission, or default, on his part or on that of his manager, even though the delay were caused by the neglect or default of his servants. The owner accordingly claimed the 612*l.* 10*s.* as hire due to him.

The umpire found that throughout the voyage from the Tyne to Oran the weather was of an unusually tempestuous character, but that, while there were occasions on which it might have been prudent to heave the vessel to, there was nothing to justify the captain of a properly seaworthy and well-found and laden vessel, such as the *Istros*, in putting into the ports of refuge and sheltering places which the *Istros* entered. He found that the time consumed in the voyage was twelve days longer than it would have been if the captain had prosecuted the voyage "with utmost dispatch" and that 490*l.*, being twelve days' hire at the charterparty rate, represented the damage suffered by the charterers in respect of the delay. He further found, however, that the delay had not been caused by any "personal act, or omission, or default" of the owner or his manager within clause 12 of the charterparty. Holding that that clause protected the owner, he awarded that the charterers should pay to the owner the sum of 602*l.* 5*s.* 10*d.*, being 612*l.* 10*s.* hire withheld, less 10*l.* 4*s.* 2*d.* brokerage due by the owner to the charterers thereon.

The question submitted for the opinion of the Court was whether, on the facts and the true construction of the charterparty, the award was right in law.

Sir Robert Aske for the shipowner. The owner is protected from liability by the terms of clause 12 of the charterparty, the umpire having found that the delay was not due to any personal act, omission, or default on his part or on that of his manager. In *Suzuki & Co., Ld.* v. *T. Benyon & Co., Ld.* (1) it was held that the general words of an exceptions clause were not intended to exempt the shipowners from the consequences of a breach by the captain of the specific obligation imposed by the charterparty to prosecute his voyages with the utmost dispatch, but that case is distinguishable from the present case in view of the difference in the language of the exceptions clauses.

The charterers did not appear.

Wright J. In effect the finding of the umpire amounts to one that there was on the part of the captain some failure of due care and due competence in putting into the ports of refuge which he entered, and that what he did was improper or negligent. In those circumstances it is necessary to consider whether the owner is entitled to claim that he is free from responsibility for those negligent or improper acts of the master by reason of the terms of the charterparty.

Under clause 8 of the charterparty the captain is to prosecute all voyages with the utmost dispatch and to render customary assistance with the ship's crew. By improperly putting into these ports of refuge it is clear, according to the finding of the umpire, that he did not prosecute this voyage with the utmost dispatch. Clause 8 also goes on to provide that, if the charterers have reason to be dissatisfied with the conduct of the captain, they are to report that matter to the owner who, on receiving the complaint, is to investigate it promptly and, if necessary or practicable, to make a change in the appointment. But, apart from that, if there were a breach of clause 8, the owner would be liable in damages for the loss to the charterer by reason of that breach unless he were protected by an exception or qualification in the charterparty—a case in which he was so held liable is *Suzuki & Co., Ld.* v. *T. Benyon & Co., Ld.* (1)

In the present case, however, the owner relies on the protection which he says is afforded to him by clause 12 of

(1) 31 Com. Cas. 183.

the charterparty. In terms that clause appears to be clear and wide enough to protect the owner against any claim in this case, and on it the umpire has come to the conclusion that the owner is not in law liable for the delay. He has made his award in the owner's favour on this point.

In my opinion, the award is right in law and I, therefore, order that it shall stand. Clause 12 appears to me, so far as the facts of this particular case are concerned, to be quite clear. There has been no want of due diligence on the part of the owner or his manager in making the ship seaworthy and fitted for the voyage, and there has been no other personal act, or omission, or default on the part of either of them. Any neglect or default that there has been, has been that of the owner's servants. The umpire has found that there was neglect or default by the master and that that caused the delay. That seems to me to come within the precise words of clause 12.

It is not necessary here to consider whether every possible case that may arise under clause 8 of a failure on the part of the captain to prosecute all voyages with utmost dispatch is covered by clause 12. I have not in my mind at this moment any specific type of a breach of clause 8 by the act of the captain for which, notwithstanding clause 12, the owner would be responsible. There may be such cases, but it seems to me that clause 12 must receive effect where the case comes within its clear terms.

If the effect is to render the owner free from any liability for loss or delay where there is a failure on the part of the captain to prosecute the voyage with the utmost dispatch, then I think that the owner is entitled to the full benefit of that clause. Clause 8, it may be said, has then no practical effect. It has a practical effect to the extent that it contains clear recognition of the duty of the captain so to act, and the effect of clause 12 is not to modify or qualify the existence of that duty, although it may operate if an action is brought against the owner for damages as a defence. In one sense, every exception clause is pro tanto inconsistent with the primary or express obligations which at law or by contract rest upon an owner or a master in respect of the goods entrusted to his charge and the duties arising under a charterparty, but, notwithstanding those obligations, exceptions clauses must receive in due course, if their language and the circumstances require it, their appropriate effect as a shield to a claim for damages.

I see nothing in the circumstances of this case to prevent the owner from relying here on the protection afforded to him by clause 12 of the charterparty.

Award upheld.

Solicitors for shipowner: *Holman, Fenwick & Willan.*

G. F. L. B.

BENTALL, HORSLEY AND BALDRY *v.* VICARY.

[1929. B. 3919.]

1930
Nov. 24;
Dec. 3.

Principal and Agent—Appointment as "sole agents"—Sale of Property—Disposal of Property by Principal without Intervention of Agents—Right to Commission or Damages.

The defendant, the owner of property, appointed the plaintiffs, who were estate agents, his "sole agents for the sale of the property" for a stipulated period, it being agreed that, if the plaintiffs introduced a purchaser, they should receive a commission of 5 per cent. on the purchase price. During the period of the agency the defendant negotiated personally and quite apart from the plaintiffs with a purchaser who had never had any communication with the plaintiffs and whom the plaintiffs did not know. The result of the negotiations was that the property was sold to this purchaser. The plaintiffs thereupon claimed from the defendant damages for breach of contract on the ground that, in selling the property direct to the purchaser, he had acted in breach of his contract with them and had thereby deprived them of their commission:—

Held, that the plaintiffs were not entitled to damages, as the contract contained no express prohibition against a sale by the defendant himself, and the implication of such a prohibition was not necessary to give business efficacy to the transaction.

Held, further, on the terms of the contract, that the plaintiffs could not recover commission at the agreed rate on the purchase price received by the defendant, as they had failed to introduce the purchaser, nor could they recover on a quantum meruit.

ACTION tried by McCardie J. without a jury.

The following statement of facts is taken, with slight alteration, from the judgment :—

The defendant was the owner of a house called "Arnewood," at Sway, Hampshire. The plaintiffs were a firm of estate agents and valuers. For some time before March, 1929, the defendant had been endeavouring to sell "Arnewood," which was a somewhat large and secluded residence. He had it in the hands of a number of agents for sale, but no successful result had been reached. Then the plaintiffs suggested to the defendant that they should become the sole agents for the disposal of the property. An interview took place, and the terms arranged were embodied in a letter which contained all the terms of the contract made.

The letter, which was dated March 25, 1929, and was addressed by the plaintiffs to the defendant, was as follows :—

"Dear Sir,—With reference to Mr. Horsley's interview with Mr. Vicary on Friday last we now write as follows to outline the arrangement made and your instructions, viz.: that we are to be appointed sole agents for the sale of the property for a period of six months to October 1st and that, if we introduce a purchaser, we are to receive a special commission of 5 per cent. on the price realised ; that you authorise us to expend on your behalf up to the sum of 100*l.* in advertising the property ; and that, if we do not sell, we are to bear 50 per cent. of this cost, it being understood that should we sell we are to receive back the whole of the amount expended in advertising within a limit of 100*l.*

"We think this clearly defines your instructions and we shall be obliged if you will kindly let us have a line confirming at your convenience. At the same time would you please give us a list of the names of those agents who already hold instructions regarding the sale of the property so that we may withdraw their present instructions and renew their instructions through ourselves. Under the arrangement outlined we shall be able to offer them full scale commission for their assistance in finding a purchaser and invite their energetic co-operation.

"As arranged with you we propose advertising the property at 6800*l*. as a whole or 6000*l*. excluding the cottage and 1½ acres."

The 5 per cent. commission mentioned was nearly double that which would normally be payable to estate agents upon a sale.

After the plaintiffs made their bargain with the defendant they proceeded to take the usual steps. They sent circulars to many possible purchasers. They interviewed various inquirers. They paid more than one visit to the property and they wrote many letters. Among other things they also prepared and inserted an advertisement in a well-known newspaper. On the whole, the plaintiffs spent about 35*l*. 10*s*. in advertisements. Apart from those costs, the plaintiffs' out-of-pocket expenses for various matters amounted to nearly 25*l*. While the plaintiffs were still endeavouring to secure a purchaser the defendant was interviewed by a Mrs. Sowler, who wished to purchase the property. She had never had the slightest communication with the plaintiffs and, so far as appears, was not even aware that they were agents for the sale of the property. She and the defendant negotiated personally and quite apart from the plaintiffs, with the result that the defendant sold to her "Arnewood," and also the cottage and plot of 1½ acres, for 5000*l*. The sale took place about the end of June, 1929.

The plaintiffs themselves were not aware of the existence of Mrs. Sowler till after the defendant had sold the property to her. Shortly before the defendant sold the property to Mrs. Sowler the plaintiffs had more than once been on the verge of concluding a sale of "Arnewood," apart from the cottage and plot, at about 4250*l*. to a Mr. Clark. He, however, raised several points of doubt and withdrew his tentative offers shortly before the defendant made his contract with Mrs. Sowler for the sale of the property.

In September, 1929, the plaintiffs began the present action against the defendant, alleging that it was an implied term of the contract between them and the defendant that, if, at any time while the plaintiffs were acting as the defendant's sole agents, the property should be sold by the defendant to a purchaser, the defendant would pay to the plaintiffs the special commission of 5 per cent. on the purchase price provided for in the letter of March 25, 1929, and would reimburse the plaintiffs in the whole of the amount spent by them in advertising the property within a limit of 100*l.* They further alleged that the defendant had repudiated their claim for commission and had failed to reimburse them in respect of the advertising. They further alleged that the defendant had wrongfully sold the property direct to Mrs. Sowler and had thereby deprived them of their commission. They claimed 298*l.*, being 262*l.* 10*s.* commission and 35*l.* 10*s.* spent by them in advertising, or damages for breach of contract, or 298*l.* upon a quantum meruit.

In his defence the defendant denied liability to pay any commission to the plaintiffs. He also said that by the contract between the parties the plaintiffs undertook to pay half the cost of the advertising if they failed to sell the property and that they had so failed. In respect of that matter he brought into Court the sum of 17*l.* 15*s.*

Rayner Goddard K.C. and *H. Malone* for the plaintiffs.
du Parcq K.C. and *W. B. Odgers* for the defendant.

McCARDIE J. read a judgment in which he stated the facts as set out above, and continued: In this action the plaintiffs put forward several claims—namely, (1.) for commission which they assert is due under the agreement, together with 35*l.* 10*s.*, the cost of the advertisements; (2.) alternatively, damages for breach of contract; and (3.) in the further alternative, a reasonable sum by way of quantum meruit.

I take these claims in order. First, are the plaintiffs entitled to commission on the sale of the property? In my opinion, the answer is "No." The material words of the contract on this point are these: "If we introduce a purchaser, we are to receive a special commission of 5 per cent. on the price realised." Now it is admitted that the plaintiffs did not here introduce the purchaser to the defendant. It, therefore, follows that the plaintiffs are not entitled to commission.

I need only cite from the judgment I gave in *Howard Houlder & Partners, Ld.* v. *Manx Isles Steamship Co., Ld.* (1) I there said: " It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers. If not, he fails." I then referred to the various decisions which establish and illustrate the rule. They range from *Bull* v. *Price* (2) and *Alder* v. *Boyle* (3) to *Mason* v. *Clifton* (4) and *Clack* v. *Wood.* (5) The plaintiffs here cannot, therefore, recover commission.

Secondly, are the plaintiffs entitled to damages for breach of contract? This raises a question of some importance. The plaintiffs were appointed " sole agents for the sale of the property for a period of six months." There was ample consideration for this agreement by reason of the arrangement as to advertising expenses. But what is the effect of the words I have just set out? The plaintiffs submit that those words gave to them, and to them alone, the right to sell the property and that, therefore, the defendant committed a breach of contract by himself disposing of it. To put it another way, the plaintiffs argue that it was an implied term of the contract that the defendant should not himself sell the property and so deprive the plaintiffs of the commission they might perhaps be able to earn.

Upon these contentions of the plaintiffs there are several observations to be made. The first is that it was the plaintiffs and not the defendant who drafted the contract. Hence the contra proferentes rule must be remembered. The second is that the Court ought not to introduce an implied term into the contract unless such implication is needed for " such business efficacy to the transaction as must have been intended at all events by both parties who are business men ": see per Bowen L.J., in *The Moorcock.* (6) That decision should always be read subject to the words of Lord Esher M.R.

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(1) [1923] 1 K. B. 110, 113-114.

(2) (1831) 7 Bing. 237.

(3) (1847) 4 C. B. 635.

(4) (1863) 3 F. & F. 899.

(5) (1882) 9 Q. B. D. 276.

(6) (1889) 14 P. D. 64, 68.

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McCardie J.

in *Hamlyn & Co.* v. *Wood & Co.* (1) He there said: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." A striking illustration of the words of Lord Esher will be seen in *L. French & Co., Ld.* v. *Leeston Shipping Co., Ld.* (2)

In the contract now before me I see nothing to prevent the business efficacy of the document by reason of the circumstance that the defendant was himself entitled to sell. If the plaintiffs had got a purchaser within the six months and before the defendant had himself sold, then they would have gained their full commission together with their right to advertisement expenses. It is to be noted that the contract contains no express words at all indicating a prohibition against a sale by the defendant himself. If the parties intended such a prohibition nothing would have been easier than to insert the appropriate words. It is also to be noted that the defendant does not say by the contract: "I give you the sole right to sell." He says only: "I appoint you sole agents for the sale," which is, in my opinion, quite a different thing.

In such contracts as the present, it is always important to observe the exact words used. I have made the last observation in view of the decisions which were cited by counsel. By reason of the interest of this case to estate agents and to other agents who work on a commission basis it is, I think, my duty to examine briefly those decisions. But, first, let me say that it is clearly settled that, where a principal, in breach of an express or implied bargain with the agent, wrongfully prevents the agent from earning remuneration, the agent can recover by way of damages the loss actually sustained by him by reason of that breach of contract. See, for instance,

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(1) [1891] 2 Q. B. 488, 491.

(2) [1922] 1 A. C. 451.

Prickett v. *Badger* (1); *Harris* v. *Petherick* (2); *Roberts* v. *Barnard* (3); Bowstead on Agency, 7th ed., Art. 65.

Now as to the decisions. I take to begin with *Brinson* v. *Davies*. (4) The headnote correctly gives the effect of the decision—namely, that where the owner of property puts it into the hands of a house agent for sale on commission there is, in default of stipulations to the contrary in the contract between the parties, an implied term that the owner shall be at liberty to sell the house himself or to employ other agents, and, if a sale takes place by such means, the agent is not entitled to commission although he has found a person who would be prepared to purchase. This is a significant decision, and it shows the general rights of an owner in the absence of express stipulation. He may, of course, stipulate, if he so pleases, that the agent, and the agent alone, shall have the right to find a purchaser. If such a stipulation be clearly made and for consideration it would bind the owner not himself to sell. But suppose no such express stipulation be made, but the owner merely agrees for consideration that the agent shall be the sole agent for the sale of the property. Does this preclude the owner from himself selling? That it would prevent him from appointing another agent is, I suppose, clear. But does it prevent him from having the right he would normally possess of himself selling in accordance with the rule indicated in *Brinson* v. *Davies* (4)? The plaintiffs say "Yes." The defendant says "No."

The plaintiffs relied on several cases which they submitted were in support of their contention. They are these, in order:—

(*a*) *Snelgrove* v. *Ellringham Colliery Co.* (5) This case is scantily reported. The broad facts, however, are that the defendants (who were partners) appointed the plaintiff their sole agent for the sale of fire-clay goods within a certain district. Thereafter, however, one of the partners acting as agent for the firm went into the district and secretly sold goods behind the back of the plaintiff. This was held by Mathew J. to be a breach of the contract appointing the plaintiff sole agent. I think that the actual decision (if correct) does not go beyond that ruling and that any apparent dictum of Mathew J. going further than that narrow decision on the special facts cannot be regarded as valid. No authorities, so far as can be seen, were cited to the learned judge, nor are the exact words of the contract set out. I respectfully adopt the opinion of the Chief Judge in Equity of New South Wales in *Cant* v. *Miller* (1) as to the true ratio of *Snelgrove* v. *Ellringham Colliery Co.* (2)

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(1) (1856) 1 C. B. (N. S.) 296.

(2) (1878) 39 L. T. 543.

(3) (1884) 1 Cab. & E. 336.

(4) (1911) 105 L. T. 134.

(5) (1881) 45 J. P. 408.

(*b*) *Milsom* v. *Bechstein.* (3) In this case the material parts of the contract were set out and they show that the plaintiff was appointed sole agent for the sale of the defendant's pianos in certain counties and districts in England and also that the defendant further and expressly agreed that he would not appoint any other agents for such areas. Yet, in spite of this agreement, the defendant supplied pianos to a person within the areas in such manner and on such conditions as to make that person the defendant's agent. Hence it was held by the Court of Appeal that the defendant had committed a breach of his contract that the plaintiff should be sole agent. The plaintiff was awarded damages. That case is quite different from the present.

(*c*) *Tredinnick* v. *Browne* (4), heard before Swift J., of which case a shorthand note has been supplied to me. I have read the whole of it. The action was by an estate agent for commission. There had been much correspondence between the plaintiff and the defendant who owned the property and it was necessary for the Court to construe various letters and various interviews between the parties. In substance, the learned judge found the actual contract to be that the plaintiff should not only be appointed sole agent for the sale of the property but also that he should receive a commission whether he introduced the purchaser or not. The keynote of the case appears where Swift J. said: "If two men, A. and B., like to make a bargain that A. shall pay B. 500*l.* if A.'s estate is sold, whether B. has anything to do with the selling of it or not, then, if the estate is sold, A. must pay." If I may respectfully say so, I agree with the actual decision of Swift J. in the plaintiff's favour in that case because the bargain between the parties was of a special character. It was quite different from the contract before me in the present case.

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(1) (1913) 13 N. S. W. S. R. 505, 509.

(2) (1881) 45 J. P. 408.

(3) (1898) 14 Times L. R. 159.

(4) (Dec. 19, 1921) unreported.

(*d*) *Chamberlain & Willows* v. *Rose* (1), heard before Shearman and Salter JJ. This was an appeal from a county court judge who had given judgment in favour of the plaintiffs, estate agents, for 36*l.* 14*s.* as commission. The defendant was a cinema owner and he had put his property in the hands of the plaintiffs on the following terms (inter alia): "The property to be left solely in your hands for sale from this date until the auction and for a further period of three months." The defendant, in fact, sold the cinema himself before the above period expired. The Divisional Court allowed the defendant's appeal. They held, first, that, on the special wording of the whole contract, the defendant had agreed that no one but the plaintiffs should have the right to sell the property; secondly, that, inasmuch as the plaintiffs had not themselves sold the property, they could not claim commission; thirdly, that the defendant, however, had committed a breach of contract by himself selling the property. The Court, therefore, sent the case back to the county court judge to assess the damage with an indication of opinion that the damages might be far less than the amount of commission inasmuch as the plaintiffs themselves (to use the words of Shearman J.) might not have been able to sell the place at all "or they might have got only a very small sum for it." Here, again, the decision turned upon special words. The contract in the case was, in my view, quite different from the contract now before me.

Each of the decisions I have cited show the importance of observing the exact wording of each contract. It is quite open to a property owner to agree that an estate agent shall have the sole right to dispose of the property and that no one else, whether another agent or the owner himself, shall deal with the property during the contract period. If, however, such a bargain is intended, then clear words must be used. In the present case I hold that the defendant committed no breach of contract by himself selling the property.

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(1) (Dec. 3, 1924) unreported. See Estates Gazette, Dec. 13, 1924.

I need only say a few words on the final alternative demand of the plaintiffs—namely, the claim on a quantum meruit. Undoubtedly, as I have already pointed out, they did work and incurred expense. But this is quite a usual feature of an estate agent's vocation when he works under a commission note which only gives him a right to recover commission when he fulfils the terms of the note. He runs the risk of losing his labour and expense unless he can comply with the conditions of the bargain. There is no scope in the present case for the operation of the doctrine of quantum meruit. The plaintiffs worked under a special contract and they have failed to do that which entitled them to commission. The maxim "Expressum facit cessare tacitum" here applies. The authorities on the point are numerous and conclusive: see *Mason* v. *Clifton* (1); *Green* v. *Mules* (2); *Martin* v. *Tucker* (3); *Barnett* v. *Isaacson* (4); *Lott* v. *Outhwaite.* (5) I had occasion to cite those authorities in *Howard Houlder & Partners, Ld.* v. *Manx Isles Steamship Co., Ld.* (6) The plaintiffs, therefore, fail also on their claim for a quantum meruit.

The result is that there must be judgment for the defendant with costs. The defendant must, of course, give credit to the plaintiffs (when the costs are taxed) for the 17*l.* 15*s.* due to the plaintiffs for the defendant's share of advertisement expenses under the terms of the contract. The defendant offered that sum to the plaintiffs before action brought and he has paid it into Court. It will now go towards the defendant's costs.

Judgment for defendant.

Solicitors for plaintiffs: *Colyer & Colyer.*

Solicitors for defendant: *Jaques & Co., for Moore, Vicary & Trestrail, Lymington.*

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(1) 3 F. & F. 899, 901.

(2) (1861) 30 L. J. (C. P.) 343, 345.

(3) (1885) 1 Times L. R. 655.

(4) (1888) 4 Times L. R. 645.

(5) (1893) 10 Times L. R. 76.

(6) [1923] 1 K. B. 110, 115.

G. F. L. B.

TOWLE (INSPECTOR OF TAXES) *v.* IMPROVED INDUSTRIAL DWELLINGS COMPANY, LIMITED.

JOHNSTONE (INSPECTOR OF TAXES) *v.* CONSOLIDATED LONDON PROPERTIES, LIMITED.

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July 18, 21, 22;
Oct. 15, 16;
Nov. 17.

Revenue—Income Tax—Blocks of Flats—Method of Assessment—" House or building let in different . . . . tenements "—Assessment on Landlord—Metropolis—Valuation—Valuation (Metropolis) Act, 1869 (32 *&* 33 *Vict. c.* 67), *s.* 45—*Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. A, No. V., r.* 7; *No. VII., r.* 8 (*c*).

Rule 8 (*c*) of No. VII. of Sch. A to the Income Tax Act, 1918, provides: " The assessment and charge shall be made upon the landlord in respect of . . . . (*c*) any house or building let in different apartments or tenements, and occupied by two or more persons severally. Any such house or building shall be assessed and charged as one entire house or tenement . . . ." :—

Held, (1.) that this rule is not excluded from application to the administrative county of London under the General Rule applicable to Sch. A as being either a rule affecting the valuation of lands, tenements or hereditaments or a rule relating to the ascertainment of the value of such lands, tenements or hereditaments.

(2.) (Romer L.J. dissenting on this point), that the annual value of a house or building let in different tenements is, where the house or building is within the administrative county of London, the aggregate of annual values of the separate tenements as fixed in the valuation list under the Valuation (Metropolis) Act, 1869.

(3.) That blocks of self-contained flats can properly be assessed and charged on the landlord under r. 8 (*c*), the unit of assessment being a block of flats approached through the same entrance from the street.

Attorney-General v. *Mutual Tontine Westminster Chambers Association, Ld.* (1875) L. R. 10 Ex. 305; (1876) 1 Ex. D. 469 applied.

Rule 7, sub-r. 2, of No. V. of Sch. A to the Income Tax Act, 1918, is not excluded by the General Rule applicable to Sch. A from application to the administrative county of London as being a rule affecting valuation of lands, tenements and hereditaments or relating to the ascertainment of values of such lands, tenements and hereditaments Rule 7 relates in its entirety to the circumstances in which deductions may be made from the annual value already ascertained under the Valuation (Metropolis) Act, 1869.

Decisions of Rowlatt J. affirmed.

APPEALS from two decisions of Rowlatt J. on cases stated under s. 149 of the Income Tax Act, 1918, for the opinion of the High Court of Justice, which raised (inter alia) the same points.

TOWLE (Inspector of Taxes) *v.* IMPROVED INDUSTRIAL DWELLINGS COMPANY, LIMITED.

In this case the following Case was stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of the Tower in the county of Middlesex.

1. At a meeting of the above Commissioners held on November 16, 1927, the Improved Industrial Dwellings Company, Ld. (hereinafter called "the Company") appealed against assessments on a new basis in groups or blocks of certain flats (built for the housing of the working classes) under Sch. A of the Income Tax Acts for the year ended April 5, 1927. The flats were known as Nos. 1 to 54 and 54a, b, c, and d, Morrison Buildings South, Commercial Road, Whitechapel. The assessments were as follows: Nos. 1 to 3, 49*l.*; 4 and 5, 37*l.*; 6 to 25, 336*l.*; 26 and 27, 36*l.*; 28 and 29, 37*l.*; 30 to 45, 283*l.*; 46 to 54, 89*l.*; 54a to 54d, 26*l.*

These flats had therefore been assessed as separate flats, and the Company contended they were aggrieved in being deprived of the legal right to claim allowances for income tax in respect of voids of one or more flats when the whole of the block in which they were grouped for assessment was not empty, and also whereby a reduced scale of allowance for repairs would be allowed under such grouping as compared with the larger allowance made in the case of each flat being assessed separately.

In the course of the hearing of the appeal the following facts were proved or admitted:—

Morrison Buildings South was a block of artisans' dwellings in Commercial Road East, Stepney. The ground floor flats were approached by passages direct from the street and access to the upper floors of the building was obtained by two flights of stairs leading from the street to landings and passages off which the front doors of the various flats opened. In some cases there were three flats on the ground floor, and in others two. There was no door at the foot of the staircases, which were open to the air on each floor, and the passages to the ground floor had no door on the street. Each separate flat had its own front door knocker and letter plate, and each was self-contained and having no means of communication from one flat to another.

3. The dwellings were in the Metropolis, and in the area to which the Valuation (Metropolis) Act, 1869, applied, and were duly assessed as separate flats, and not in blocks or groups, by the Stepney Borough Council, without objection by the inspector of taxes for the time being in the district in the valuation list made in the year 1925. The gross values of the respective flats as several hereditaments in their respective classes, under the provisions of the 1869 Act, were not liable to be re-assessed for rating purposes (except in the case of structural alterations, which had not occurred in this case) during the quinquennial period ending 1930, and allowances for income tax purposes in previous years for repairs in respect of such flats had been allowed theretofore at the rates set out in the Finance Act, 1923, and allowances had been made for any period for which any of the flats might have been void, or rent might have been lost.

4. The assessments to income tax appealed against were not made in respect of each flat separately, but each assessment included all the flats in one group or block approached from the street by a separate entrance, the amount of each assessment being arrived at by adding together the gross values shown in the valuation list of all the flats in the group comprised in the assessment. The result of forming the individual assessments into the groups above stated was that the allowance for repairs was reduced and (as the Company contended) that no allowance for voids or loss of rent could legally be claimed unless the whole of the flats in a particular block or group were empty, or not rent-producing at one and at the same time.

5. The Company contended :—

1. (*a*) That each of the flats was in fact and in law a separate house for all the purposes of the Income Tax Acts, and was to be assessed and charged separately.

(*b*) That r. 8 (*c*) of No. VII. of Sch. A to the Income Tax Act, 1918, upon its true construction, and the

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facts of the case, had no application to the property in question.

(*c*) That there was no evidence upon which it could be held that the property in question was within r. 8 (*c*), or alternatively, that any such finding would be wrong in law.

(*d*) That in law and under the circumstances of the case the amount of assessment to be reduced by the authorized reduction for the purposes of collection pursuant to the relative provisions of r. 7 of No. V. to the said Sch. A (as amended) was the amount of the assessment upon each flat or house separately.

2. (*a*) That the property in question was situate within the administrative County of London, with respect to which the valuation list under the Valuation (Metropolis) Act, 1869, was made conclusive for the purposes of the Income Tax Acts.

(*b*) That each of the said flats was entered in the said relative valuation list as a several and separate hereditament or house with its separate gross value in its appropriate class pursuant to the said Act of Schs. 2 and 3 thereof.

(*c*) That the inspector of taxes had a statutory right of appeal from the assessment which was not exercised, and the said valuation list thereby became conclusive for the purposes of the Income Tax Acts.

(*d*) That the assessment of the flats or houses by grouping the same, as contended for by the inspector of taxes, involved an alteration of the valuation list and the gross values and classes, contrary to the provisions of the Valuation Act, 1869, and the Income Tax Acts.

(*e*) That the assessments of the flats or houses by grouping, as contended for by the inspector of taxes, was pursuant to r. 8 (*c*) of No. VII. of the said Sch. A to the Income Tax Act, 1918, or otherwise, which was a rule relating to valuation and was expressly excluded by the provisions of Sch. A.

6. The inspector of taxes contended (inter alia):

(*a*) That the unit of assessment in each case was each group of flats in accordance with r. 8 (*c*) of No. VII. of Sch. A of the Income Tax Act, 1918, notwithstanding that the flats in question were situate within the area of the Valuation (Metropolis) Act, 1869.

(*b*) That the amount of the assessment for the purposes of r. 7 of No. V. of Sch. A of the Income Tax Act, 1918, as amended was the amount of the assessment on each group of flats.

(*c*) That the assessments as made were correct and should be confirmed.

7. (*a*) The Commissioners determined, firstly, that the gross assessments of the several flats or separate houses made under the Valuation (Metropolis) Act, 1869, were conclusive for the purposes of the Income Tax Acts during the quinquennial period 1925–1930, and that r. 8 (*c*) of No. VII. of the said Sch. A of the Income Tax Act, 1918, was a rule relating to valuation, and was excluded by the first general paragraph of the First Schedule, Sch. A of the Income Tax Act, 1918, from affecting the existing valuation of the flats under the Valuation (Metropolis) Act, 1869.

(*b*) That if in the opinion of the High Court such first determination was wrong and the flats could in law be re-assessed during such quinquennial period, then under r. 8 of No. VII. Sch. A of the Income Tax Act, 1918, the various flats should be assessed together in blocks or groups consisting of those flats approached from the street by a separate entrance.

The Crown appealed from the first determination, and the Company from the second.

Before giving judgment Rowlatt J. heard arguments in *Johnstone* (*Inspector of Taxes*) v. *Consolidated London Properties, Ld.* and delivered one judgment on both cases in the course of which he said that income tax under Sch. A was to be charged in respect of the property in all lands, tenements, and hereditaments for every 20*s*. of the value thereof, and in the Metropolitan area the annual value was, by ss. 45 and 51 of the Valuation (Metropolis) Act, 1869, to be the gross value stated in the valuation list. The flats in the buildings in question had been separately assessed under the Act of 1869, but for Sch. A purposes an assessment on

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the landlord, which consisted in adding together the separate assessments of a block of flats had been made under r. 8 (*c*) of No. VII. of Sch. A, which provided that the assessment and charge should be made on the landlord in respect of "(*c*) any house or building let in different apartments or tenements, and occupied by two or more persons severally. Any such house or building shall be assessed and charged as one entire house or tenement." It seemed to him that all that had been done was to apply that rule. It had been argued that the value of a block was not the same thing as the aggregate value of its component parts. But he thought that the intention was that the separate valuations were to be added together not to reach the value of the aggregate, but to place all the component parts in one assessment. It was said, however, that r. 8 was a rule "affecting valuation" or relating "to the ascertainment of value," and was, therefore, excluded from application so far as the Metropolis was concerned. In his view r. 8 had nothing to do with valuation, but with the aggregate of assessments.

The further point was argued, he said, that in granting that r. 8 applied, the assessment was wrong because there was no "house or building let as tenements," but a number of self-contained tenements not having doors to the street, but reached by common staircases or passages. It was said that each flat was a "house or building," and that the common staircases and passages were no more than a private right of way. He did not think that that argument was sound. He therefore allowed the appeal and dismissed the cross-appeal.

The company appealed. The appeal was heard on July 22; Oct. 15, 16, 17, 1930.

Latter K.C. and *Lawrence Tooth* for the appellants. Rule 8 (*c*) of No. VII. of Sch. A to the Income Tax Act, 1918, does not apply to the Metropolis in view of the General Rule to the Schedule which excludes from application to the administrative county of London three classes of rules—namely, (1.) rules affecting valuation; (2.) specified rules; and

(3.) rules relating to the ascertainment of value. The reason of this exclusion is that within this area the Valuation (Metropolis) Act, 1869, applies. Sect. 4 of that Act defines "gross value" as meaning the annual rent which a tenant might reasonably be expected to pay. Then s. 45 makes the valuation list conclusive evidence of the gross value and of the rateable value for the purpose of (*a*) the tax on houses levied under the House Tax Act, 1851, and (*b*) any tax assessed in pursuance of the Income Tax Act, 1842, and any Acts continuing or amending the same. Rule 8 (*c*) of No. VII. has the effect of directing assessment on the landlord in respect of a new subject-matter not contained in the valuation list. Under Sch. A the assessment to tax is on the annual value. Unless, therefore, as the Crown contends, the annual value of a whole building let in separate tenements is the sum of the assessed annual values of the separate tenements, a valuation is necessarily involved in arriving at the annual value of the whole building. The case of a new subject-matter not included in the valuation list is provided for in s. 76 of the Act of 1869, and r. 8 (*c*) would, if it applied, render such a valuation necessary. It is therefore excluded from application in London. It will be said however (*a*) that there is a rule of law making the value of the whole the aggregate value of the parts, and (*b*) that r. 8 (*c*) only affects the personality of the person charged. In support of the second point reliance is placed on the heading of No. VII., "Rules as to Persons chargeable." But this does not limit the effect of the rules in No. VII., if in fact they go further: *Kirke's Trustees* v. *Inland Revenue Commissioners*. (1) Rule 7 (2) of No. VII. clearly goes further and so, it is submitted, does r. 8 (*c*), which was originally s. 36 of the Income Tax Act, 1853. It is contended that there should be a separate assessment of each flat, just as was held to be the case in *Reg.* v. *St. George's Union* (2) in regard to rating.

In support of the contention that there is a rule of law making the value of the whole the aggregate of the values

(1) (1926) 11 Tax Cas. 323, 329.

(2) (1871) L. R. 7 Q. B. 90.

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of the parts, *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (1), a case relating to inhabited house duty, is relied on. But the point was not really in issue there. By r. 7 of Sch. B to the House Tax Act, 1808 (48 Geo. 3, c. 55), no dwelling-house is to have a less annual value than the rent or value at which the same premises stood charged in the last rate. The result of this was that the annual value of the whole building could in no circumstances be less than the sum of the annual values fixed for the separate tenements by the Valuation (Metropolis) Act, 1869. It became immaterial therefore to argue that this was not the true annual value of the whole building, and passages in the judgments stating that this was so were no more than dicta, which are not enough to establish a rule of law to this effect. The decision in *Williams* v. *Sanders* (2) by Rowlatt J. that outside London the annual value of a house divided into separate tenements is the aggregate value of the rack rents at which the tenements were let is, it is submitted, wrong.

Again, the house or dwelling within the meaning of the Income Tax Act, 1918, is in this particular case each separate workman's dwelling. It is not a mere question of fact but a question what on the facts found is the inference of law: *Farmer* v. *Cotton's Trustees.* (3) The facts here show that the workmen's dwellings resemble a line of houses with a road under cover. The division into separate blocks here is arbitrary, and each block is not a building in the sense of being a unit: compare *Grant* v. *Langston.* (4)

Hon. Stafford Cripps K.C. and *R. P. Hills* (*Sir William Jowitt A.-G.* with them) for the respondent. The Valuation (Metropolis) Act, 1869, has to do only with valuation for the Metropolis and not with assessment, and it would be startling if such an Act were treated as overruling the provision in the Income Tax Act, 1853, s. 36. The appellants' argument involves the contention that the Act of 1869 made s. 36 of

(1) (1875) L. R. 10 Ex. 305; (1876) 1 Ex. D. 469.

(2) (1927) 11 Tax Cas. 673.

(3) [1915] A. C. 922, 932, 933.

(4) [1900] A. C. 383.

the Act of 1853 inapplicable to London. Approaching the problem from this aspect it becomes clear that Rowlatt J. was right in holding that r. 8 (*c*) of No. VII. of Sch. A to the Act of 1918, which took the place of s. 36 of the earlier Act, was not excluded from applying to London. Sect. 36 of the Act of 1853 and the rule that has taken its place have nothing to do with valuation but only with assessment and charge. Assessment means estimating the amount of tax, and charging means fixing the liability to tax on the particular person. No alteration is made in the valuation, but machinery is provided to enable tax to be collected more easily in the case of tenement houses. In view of the fact that the provision now embodied in r. 8 (*c*) was already in existence as early as 1853, it would be natural to expect that if the Act of 1869 was to make it inapplicable to London, there would be some express provision altering the mode of assessment and charge. But there is nothing of the kind, and s. 45 only makes the Act conclusive for the purpose of determining gross values. Further, s. 75 of the Act of 1869 saves the power to value property not contained in the valuation list. Therefore if the appellants' contention that the annual value of a whole building let in separate tenements is not the aggregate of the annual values of the separate tenements, the whole building would have to be valued under the Income Tax Acts, and it has been decided that in that case the value is arrived at by taking the aggregate of the separate values. Sect. 76 has no bearing on this. It is to be noted that in Sch. V. of the Act of 1869, ss. 32 and 47 of the Act of 1853 and "so much of the rest of the Act as relates to the mode of ascertaining the value of any hereditaments" are repealed. No express reference is made to s. 36, and the general words were presumably only intended to cover any other provision of the kind mentioned that the draftsman had overlooked.

It is not contended that the heading to No. VII. of Sch. A of the 1918 Act is conclusive as to the effect of the rules it contains, but in a case of doubt it may assist in arriving at their meaning. The General Rule to Sch. A does not, as has

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been contended, exclude three classes of rules from application to London, but only two—namely (1.) rules affecting the valuation of lands within the administrative county of London; and (2.) certain specified rules and "any other rule which relates to the ascertainment of value of such lands." The latter words replace those in Sch. V. to the Act of 1869, and are inserted to catch any rule similar to the specified rules that may have been overlooked. Therefore what are excluded from application to London are rules affecting valuation and rules relating to the ascertainment of value. The exclusion, then, is in respect of machinery for arriving at annual value and not of matters relating to assessment or charge. Further, the exclusion of "any other rule" can only apply to a whole rule and not a part of a rule. It has never been contended that r. 8 (*a*) and (*b*) do not apply to London, and r. 8 (*c*) must do so also. Moreover, r. 8 is merely a proviso to r. 1 of No. VII., which unquestionably applies to London.

In *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (1) the principal points raised were: (*a*) whether the landlord or the tenant was to be assessed, and (*b*) whether there was to be a separate assessment of the premises or their valuation was to be taken as that in the valuation list under the Metropolis (Valuation) Act, 1869. It was there held that the association must be assessed as occupiers of each block treated as one dwelling-house and that tenants of the different suites ought not to be assessed as occupiers of distinct properties, and that the value of each block was properly represented by the aggregate sum appearing in the valuation list. The case shows that there may be separate house where there are separate and distinct entrances. That authority is binding on this Court.

The meaning of the word "house" is discussed in *Grant* v. *Langston*. (2)

[On this point they also referred to *Williams* v. *Sanders* (3) and *Embleton* v. *Norwich Union Life Insurance Society*. (4)]

(1) L. R. 10 Ex. 305; 1 Ex. D. 469.
(2) [1900] A. C. 383, 391, 396, 401.
(3) 11 Tax Cas. 673.
(4) (1927) 11 Tax Cas. 681.

Further, the fact of there being no separate front door to the flats makes no difference: *St. Marylebone Assessment Committee* v. *Consolidated London Properties, Ld.* (1); *Western* v. *Kensington Assessment Committee.* (2)

[They also referred to *Fry* v. *Salisbury House Estate, Ld.* (3)]

Latter K.C. replied.

Cur. adv. vult.

Nov. 17. The following written judgments were delivered.

Lord Hanworth M.R. This is an appeal by the Company against the decision of Rowlatt J. given on May 7, 1930, whereby he held that the mode of assessment upon the Company was correct.

The Company are the owners of certain blocks, or groups, of flats built for the housing of the working classes and known as Nos. 1–54 and 54a, b, c and d Morrison Buildings, South Commercial Road, Whitechapel, in the borough of Stepney in the county of London. The assessments complained of were assessments to income tax under Sch. A for the year 1927. Previously the flats had been assessed severally and separately, whereas under the assessments objected to they were assessed in groups. Thus, for illustration, 1–3 were assessed at 49*l.*, 4 and 5 at 37*l.*, and 6–25 at 336*l.* They were so assessed on the ground that each group formed a house or building let in different tenements within r. 8 (*c*) of No. VII. of Sch. A, for each group had a separate entrance from the street which led to them.

The Commissioners decided that the above r. 8 (*c*) did not apply within the county of London, and that the valuation of the flats or tenements existing under the Valuation (Metropolis) Act, 1869, was not affected or altered by the rule.

If, however, this decision was held to be erroneous, and r. 8 (*c*) did apply, then, secondly, they decided that the various flats or tenements should be assessed together in blocks or groups consisting of those flats approached from the street by a separate entrance, common to the group.

(1) [1914] A. C. 870.

(2) [1908] 1 K. B. 811.

(3) [1930] A. C. 432.

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The inspector of taxes appealed from the first decision, and the Company from the second. A case was stated accordingly, and Rowlatt J. heard arguments on both these points. He decided, reversing the decision of the Commissioners upon the first point that r. 8 (*c*) did apply and that the assessments in groups were rightly made. He also agreed with the Commissioners on the second point that the integer to be assessed is the group of tenements to which there is a common entrance and access from the street.

From this decision the Company appeal to this Court on both points.

The appeal undoubtedly raises a point of substance; for the Company claim that they are aggrieved in being deprived of the legal right to claim allowances in respect of voids, if the assessment is charged upon a group of tenements said to form one entity. They also claim that the allowance permitted for repairs is larger, if each tenement is treated individually, than it would be if the entity assessed is a group of tenements.

As the Case states in para. 3, these dwellings or tenements are in the area to which the Valuation (Metropolis) Act, 1869, applies, and they were duly assessed as separate flats and not in blocks or groups by the Stepney Borough Council in the valuation list made in the year 1925, which remains in force during the quinquennial period ending 1930. In previous years before the year of assessment 1927, allowances for repairs for income tax purposes in respect of the flats have been allowed at the rates set out in the Finance Act, 1923, and allowances have been made for any period during which any of the flats, separately, may have been empty or rent lost.

In the case of the first group Nos. 1–3, the annual values in the valuation list were 18*l*., 15*l*. and 16*l*. respectively.

They are now assessed in a group together at the figure reached by the addition of these three sums totalling 49*l*.: and it is obvious on this system that there is less chance of any allowance being permitted in respect of voids, and that the rate of allowances for repairs is smaller. I have set out these facts in order to emphasize the importance of the case to the appellants, though they do not assist in the solution of the difficult problem, which is to determine whether the r. 8 (*c*) applies, and gives the inspector the right to the assessment which he has now adopted. It is agreed that it is under this rule that he finds his authority, and not elsewhere.

By s. 36 of the Income Tax Act, 1853, it is provided that "Any house or building let in different apartments or tenements, and occupied by two or more persons severally, shall nevertheless be charged to the duty under this Act as one entire house or tenement, and the assessment thereof shall be made on the landlord; but in default of payment by him the duty so charged and assessed may be levied on the occupier or occupiers respectively, and being paid by them or one of them shall be deducted and allowed out of the next or any subsequent payment on account of rent."

This section is the forerunner of r. 8 (*c*); and the latter rule, which is found in the consolidating Income Tax Act, 1918, replaces s. 36 which is repealed in Sch. VII. of the Act of 1918. Sect. 36, does not, nor indeed does the Act of 1853, purport to deal with the mode of valuation for income tax or its imposition. By s. 5 of that Act, the duties of income tax imposed by it are to be "assessed, raised, levied and collected under the regulations and provisions" of the Income Tax Act of 1842. It is true that the words of s. 36 are "that any house or building let in different apartments or tenements . . . . shall . . . . be charged to the duty . . . . as one entire house or tenement, and the assessment thereof shall be made on the landlord"; but stress cannot be laid upon these words, charge, assess, or assessment, for, as pointed out by Lord Wrenbury in *Kensington Income Tax Commissioners* v. *Aramayo* (1), these words are used in a number of senses throughout the Income Tax Acts. It is enough to note that s. 36 does not provide the machinery for the measurement of the tax charged. It only deals with the unit in respect of which the tax shall be ascertained and from whom in respect of that unit it is to be collected or recovered.

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(1) [1916] 1 A. C. 215, 227.

The Valuation (Metropolis) Act, 1869, was passed to secure uniformity in the assessment of rateable property in the Metropolis, and it is based upon its predecessor, the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), which is referred to as "the principal Act."

The valuation list is to be made under these two Valuation Acts. A duplicate of it is to be sent to the surveyor of taxes, who may insert the amount in his opinion of the gross value of the hereditaments comprised in such list where such amount differs from the amount inserted by the overseers, and the surveyor has a right to object to the valuation list and to carry his objection further for decision by the assessment committee. But he has no separate and independent right of valuing or inserting his own value in the valuation list. He can contest the value inserted by the overseers, but he is not the authority to determine what shall be the value ultimately contained in the valuation list. When the valuation list has been ultimately settled it is conclusive of the values contained in it for the purpose of the income tax charged under Sch. A. See s. 45, sub-s. 2 (*b*).

Sect. 75 saves the mode of valuing or taxing any hereditament which is not included in any valuation list or which is not charged under Sch. A. It preserves the system of the Income Tax Acts except when the value in the valuation list had under s. 45 been made conclusive.

Finally, it may be worth while noting that by a rule laid down in Sch. III. of this Act, the maximum rate of deductions prescribed in that schedule is not to apply to houses or buildings let out in separate tenements, but the rate of deductions in such cases is to be determined in each case according to the circumstances and the general principles of law. There is thus no prescribed rate of deductions on which reliance can be placed as necessarily applicable to houses or buildings of this class.

In 1875 the case of *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (1) was decided. The question raised was whether the owners of a building let out in separate tenements to several occupiers were assessable to the inhabited house duty, or whether the respective tenants of the different tenements must be assessed as occupiers of distinct properties. There was a rule in the schedule to the Act which is in pari materia with s. 36 above. It was held that the rule applied, and that the Association must be assessed and treated as occupiers of the several blocks which comprised in the whole one dwelling-house. It was also held that inasmuch as s. 45 of the Valuation (Metropolis) Act, 1869, made the valuation list in force under that Act conclusive for the tax levied for inhabited house duty, the right way to value such a block was by aggregating the value of the several tenements appearing in the valuation list, although owing to some of the suites being unlet and producing no rent, the valuation list did not correctly represent the annual value to the Association.

That decision was affirmed in the Court of Appeal which consisted of Jessel M.R., Lord Coleridge C.J., and Pollock B. It seems to me that if the matter rested at this point, this Court would be bound to hold in accordance with that decision that the assessments in question were rightly made. It would seem, as said by Mr. Cripps, that the effect of the Valuation Act, 1869, is to lift out of the valuation list the values contained in it, and to place them in the assessment to be made for income tax under Sch. A; and this, despite the obvious criticism that such a transfer prevents the full rebate being granted for voids or in respect of repairs.

It is now necessary to turn to the Income Tax Act, 1918. Rule 8 (*c*) of No. VII. of Sch. A would appear to be explicit, and in terms the equivalent of s. 36 of the Act of 1853. Its effective words run: "The assessment and charge shall be made upon the landlord in respect of . . . . (*c*) any house or building let in different apartments or tenements, and occupied by two or more persons severally. Any such house or building shall be assessed and charged as one entire house or tenement." Although in different sequence, they are the same words that appear in s. 36.

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(1) L. R. 10 Ex. 305.

But it is claimed that the rule does not apply because it is excluded from being of effect in the area of the administrative County of London to which the valuation list under the Valuation (Metropolis) Act of 1869 is by that Act made conclusive, by the terms of the preliminary statement to the Rules applicable to Sch. A. That provides that: "Any other rule which relates to the ascertainment of the value of such lands, tenements, ... shall not apply within the administrative County of London." The short point therefore that remains may be stated as follows: is r. 8 (*c*) one which relates to the ascertainment of the value of such lands, tenements, etc. ?

For the reasons given it appears to me that its predecessor s. 36—did not relate to the ascertainment of value. That was to be reached, aliunde, by a different process and under a different series of sections. But r. 8 (*c*) deals with the incidence of the charge when ascertained—in other words, with the mode of collection of the tax at a standard or value reached before the direction contained in the rule comes into play.

The criticism that the plan now adopted is new, or a reversion from the practice hitherto adopted, does not assist the determination of the question. It may be that the previous practice was wrong. Whether right or wrong, we have to decide what is the true interpretation of these complex provisions in several statutes which are made to interact upon each other.

I come, therefore, to the conclusion that the judgment of Rowlatt J. on this point must be affirmed.

Upon the second point argued, namely, of what does the house consist which is let in separate apartments or tenements ? Is each separate tenement, or is each group of tenements to which there is a common entrance from the street, a house ; or is the larger building of which these groups form part, the house ? I agree with the conclusion reached by Rowlatt J. who on this point affirmed the Commissioners and also with the judgments which Slesser and Romer L.JJ. are going to deliver.

I would, however, like to add that it appears to me that the question—What is the entity which is to be treated as a house ?—is one of fact rather than of law. It is one of degree on which different minds might form different opinions. It is just the sort of point on which the Court is entitled to accept the decision of the Commissioners unless they have, in reaching their conclusion, made an error in point of law. We have had plans—A and B—which form part of the case stated, shown to us for the purpose of completing the materials and facts upon which a decision is to be reached.

It is, however, not for the Court to express its opinion upon these data. In such cases the Court has the advantage of relying, and ought to rely, upon the estimation of them made by the Commissioners. Their conclusion was upheld by Rowlatt J. In my judgment the appeal fails upon this point also and must be dismissed with costs.

SLESSER L.J. The subject-matter of this appeal is a number of flats built for the housing of the working classes, the assessment on which has been made on a basis of which the Improved Industrial Dwellings Company, Ld., the owners, complain. The whole of the flats are contained physically in one block of artisans' dwellings in Commercial Road, Stepney, the ground floor flats being approached by passages direct from the street and access to the upper floors of the building is obtained by two flights of stairs leading from the street to landings and passages off which the front doors of the various flats open. There is no door at the foot of the staircases which are open to the air on each floor and the passages to the ground floor have no door on the street. Each flat is self-contained. There is a number of such ground floor passages and stairs and the contention of the Crown is that the whole of the flats served by one common staircase form a separate house or building. There is no opening between any such group of flats so served by one opening or staircase and another group similarly served.

The flats in question, being in the Metropolis, have each been separately valued and assessed for the purposes of rating in accordance with the decision in *Reg.* v. *St. George's Union* (1), and there is no dispute here but that each flat is a rateable hereditament and has been properly so separately rated and assessed in the valuation list under the Valuation (Metropolis) Act, 1869.

By s. 45 of that Act it is provided that the valuation list for the time being in force shall, for all or any of the purposes in the section mentioned, be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein and, by sub-s. 2 of the same section, it is provided that one of the purposes in the section mentioned is: "(*b*) Any tax assessed in pursuance of the Income Tax Act . . . . on any lands tenements and hereditaments, in all cases where the tax is charged on the gross value, and not on profits."

The effect of this provision is reflected in Sch. I. of the Income Tax Act, 1918, headed: "Rules applicable to Schedule A," which provides that "Nothing in these rules shall affect the valuation of lands, tenements or hereditaments within the administrative county of London with respect to which the valuation list under the Valuation (Metropolis) Act, 1869, is by that Act made conclusive for the purposes of Income Tax;" and (certain rules which are distinguished by an asterisk) and "any other rule which relates to the ascertainment of the value of such lands, tenements or hereditaments shall not apply within the administrative county of London, except in the case of hereditaments which are not included in any such valuation list. . . ."

It follows therefore from the combined effect of s. 45 of the 1869 Act and the rule which I have just quoted that the valuation in the metropolitan area on which tax under Sch. A is to be charged is to be equivalent to the rateable value of the several hereditaments, that is, in this case, of the individual flats and no other. But the issue which is to be determined on this appeal is, having regard to certain further statutory provisions, whether each of the said flats is to be assessed on a separate gross value in its appropriate class, as is contended by the subject, or whether the assessment of the flats is to be arrived at by grouping the flats which are served by a common staircase and aggregating their value, as is contended by the Crown. The financial effects of adopting either view and the consequent burdens on the subject and rights of the Crown as to voids and repairs and otherwise, have been pointed out by the Master of the Rolls.

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(1) L. R. 7 Q. B. 90.

Apart from the particular problems raised by the Valuation (Metropolis) Act, 1869, the Crown point to the fact that whereas under Sch. A, No. VII., r. 2: "Every person having the use of any lands or tenements shall be deemed to be the occupier thereof," under No. VII., r. 8 (*c*), an exception is made as follows—namely, that "the assessment and charge shall be made upon the landlord in respect of " any house or building let in different apartments or tenements, and occupied by two or more persons severally. Any such house or building shall be assessed and charged as one entire house or tenement."

Outside the Metropolis at any rate, therefore, they contend that there can be no question that this, being a house or building let in different apartments or tenements, the house or building would fall to be charged as one entire house or tenement, and further, by the opening words of r. 8 (*c*), that the assessment and charge should be made upon the landlord. Outside the Metropolis, such an assessment and charge would be made directly upon the whole house or building, for in such case the annual value would not have to be ascertained by reference to the rateable value of the component hereditament flats and, therefore, the problem of the possibility of the aggregation of these component rateable values would not arise; but in London it is clear that no such independent valuation of the whole house or building is possible, because s. 45 of the 1869 Act has defined the valuation by reference to the rateable valuation of the

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several hereditaments in the valuation list and it cannot be arrived at in any other way.

If the aggregation of the rateable values affects the valuation of lands, tenements or hereditaments within the administrative county of London, or if the aggregation is the ascertainment of the value of such lands, tenements or hereditaments, r. 8 (*c*) is excluded by the operation of the governing words relating to London which I have quoted, and as r. 8 (*c*) is now the sole authority for assessing or charging the house or building let in apartments or tenements as one entire building, if such a rule is to be excluded there is no power left to aggregate and, consequently, the subject must succeed in this appeal. But I have come to the conclusion that it is not possible to say that the mere aggregation of the rateable values, so as to assess and charge the landlord as one entire house or tenement, by adding up the values of the tenements is either to effect the valuation of lands, tenements or hereditaments, nor does the application of r. 8 (*c*) relate to the ascertainment of the value so as to exclude its application within the metropolitan area.

Rule 8 (*c*) in the Consolidation Act of 1918, repeats in substance s. 36 of the Income Tax Act, 1853, before which time each tenement would have been separately charged. Between 1853 and 1869, therefore, the landlord would have been assessed and charged in London as in the rest of the country, and in that section it is further provided (a provision which is substantially repeated in r. 8 of Sch. A of the 1918 Act) that in default of payment by him (the landlord) the duty so charged and assessed may be levied on the occupier or occupiers respectively, and being paid by them or one of them, shall be deducted and allowed off the next or any subsequent payment on account of rent. In r. 8 (*c*) this default provision appears as follows: "Provided that in each of the above cases in default of payment by the landlord, the tax may be levied upon the occupier or occupiers respectively." This default clause indicates that the Legislature has not entirely lost sight of the occupiers of the various apartments or tenements notwithstanding the fact that the charge is primarily since 1853 to be made upon the landlord, and this in itself points to the liability of the landlord being one which is arrived at by the aggregation of the component tenements.

Despite the forcible argument of Mr. Latter, I am unable to see how the provisions in Sch. A, No. VII., r. 8 (*c*), or, for the matter of that, in s. 36 of the Act of 1853, can be said to be a mode of ascertaining value. It is to be observed that by s. 77 of the 1869 Act and Sch. V. of that Act, there is repealed, where they relate to the Metropolis, "any Act authorizing any valuation of hereditaments to be made for the purpose of any tax in respect of which the valuation list is by the Act made conclusive, and ss. 32 and 47 (neither of which is applicable here) and so much of the Act of 1853 as relates to the mode of ascertaining the value of hereditaments with respect to the value of which the valuation list is conclusive," no reference being made at all to s. 36 of the 1853 Act. Had the Legislature in 1869 intended to limit the operation of s. 36 of the Act of 1853, it would, I think, have amended or repealed it in some more or less specific manner; but the difficulty of Mr. Latter does not end there. It is I think clear that the first provision of r. 8 (*c*)—namely, that the assessment and charge shall be made upon the landlord cannot, on any construction, be said to be a mode of ascertaining the value as stated in the 1869 Act, nor, to use the somewhat different though substantially similar language of the Rules applicable to Sch. A, the ascertainment of the value or the affecting of the valuation. If then this part of the rule is so applicable to London so that the landlord on any construction is to be assessed and charged the appellant is limited on any contention in his exclusion of r. 8 to para. (*c*), so that the result, on his construction, would be that even in London, the assessment and charge would be made upon the landlord (this now being a mode of valuation), but the house or building would be assessed and charged upon the several rateable hereditaments in the valuation list. The language of the Rules applicable to Sch. A makes this construction difficult, for, after setting out certain specific rules, the whole of which are distinguished by an asterisk, which are therefore totally excluded, it goes on to exclude in London any other rule relating to the ascertainment of value and does not purport to include part of any such other rule and exclude another part. Again, if the assessment and charge is to be made upon the landlord in respect of each rateable hereditament separately, he is not the occupier of such hereditament and, therefore, if the latter part of r. 8 is to be excluded, one would have expected to find, as regards London, some amendment of rr. 1 and 2 of No. VII., which provide that the tax shall be charged on and paid by the occupier for the time being and that any person having the use of any lands or tenements shall be deemed to be the occupier thereof. I find it impossible, therefore, to believe that r. 8 can be so interpreted that the earlier limb relating to the chargeability of the landlord shall apply in London and that the latter limb, that the assessment and charge shall be made upon the whole house, shall not.

Although there is no direct authority on this point, there is a case decided under the Inhabited House Duty Acts, which fortifies me in the opinion which I have indicated. That case is *Attorney-General* v. *Mutual Tontine Westminster Chambers Association.* (1) In that case, an association owned several blocks of buildings, each block was divided into two ranges by an internal staircase having one door at the principal or street entrance, and was structurally divided into different tenements or suites of rooms quite distinct from and having no means of communication with each other except that each had a common door opening on to the common staircase. In the valuation list prepared under the Valuation (Metropolis) Act, 1869, in accordance with the decision in *Reg.* v. *St. George's Union* (2) decided in 1871, to which I have already referred, each suite of rooms was entered in the valuation list under the Act of 1869 as a separate hereditament, and the question arose whether for the purposes of the inhabited house duty the association should be assessed as occupiers and each block treated as one dwelling-house. It was held by a majority and confirmed unanimously in the Court of Appeal that the landlord must be assessed as occupier of the whole block treated as one dwelling-house, and, secondly, that the value of each block was properly represented by the aggregation of the values appearing in the valuation list.

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(1) 10 Ex. 305; 1 Ex. D. 469. (2) L. R. 7 Q. B. 90.

A provision very similar to that which was inserted by s. 36 of the Income Tax Act, 1853, but applicable to house duty, was contained in a rule made under 48 Geo. 3, c. 55, Sch. B, to the following effect: Rule 6. "Where any house shall be let in different stories, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to and shall in like manner be charged to the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling house, and shall be charged to the said duties." By r. 14 it was provided that "Where any dwelling house shall be divided into different tenements being distinct properties, every such tenement shall be subject to the same duties as if the same was an entire house, which duty shall be paid by the occupiers thereof respectively." This latter rule is substantially to be found in r. 12 of No. VII. of Sch. A of the Income Tax Act to the following effect—namely: "Where a house is divided into distinct properties, and occupied by distinct owners or their respective tenants, such properties shall be separately assessed and charged on the respective occupiers thereof." Part of the argument in the *Tontine* case (1) was devoted to the question whether the properties were or were not distinct properties so as to come within this r. 14, a point not here argued, but the *Tontine* case (2), in my view, raised other considerations more material to the present case. The Act of 1869, by s. 45, sub-s. 2 (*a*), makes applicable the valuation list thereunder to the tax on houses levied under the House Tax Acts as well as under the Income Tax Acts and, in Sch. V., repeals so much as relates to the mode of ascertaining the value of a house with

(1) L. R. 10 Ex. 305; 1 Ex. D. 469.

respect to the value of which the valuation list is conclusive under the House Tax Act. Jessel M.R., in the Court of Appeal (1), appears to accept the contention of the Crown as regards inhabited house duty that you can ascertain the value of the house from the valuation list by adding up the value of all the tenements. He says (2): "In the present case you can ascertain its separate value" (the house) "from the valuation list by adding up the value of all the tenements; in fact, that it is for this purpose separately valued, because you can ascertain without going beyond the list" (i.e., the valuation list under the Act of 1869) "the total separate valuation of the hereditaments." In that case, according to the judgment of Cleasby B. in the Court below, the question was: "Is the house to be assessed under rule 6 or rule 14?" That is to say, the issue was whether the properties were distinct properties or not. But this very question seems to assist the interpretation for which the Crown here contend—namely, that r. 6 of the House Tax Act (which is equivalent to r. 8 (*c*) under the Income Tax Acts) did apply if the properties were not distinct properties, notwithstanding the fact that under the Act of 1869 and the decision in *Reg.* v. *St. George's Union* (3), the tenements had been separately valued. Further, in the *St. George's Union* case (4) Blackburn J. said in the course of the argument that the aggregate of the values of each set will be the value of the whole block and, though such an observation is there made obiter it is, in my view, consistent with the opinions expressed in the *Tontine* case. (5) All the authority, therefore, which exists on this point is in favour of the construction contended for by the Crown. That is to say, if the aggregation of values of the flats for the purpose of house tax is not a mode of ascertaining value, so also is it not for the purpose of income tax.

A further point was taken by Mr. Latter, that the block served by a separate staircase is not a house or building, and, as I understand him, he says either, first, that each flat is a house or building or, alternatively, that the whole series of buildings, in so far as they are physically in contact under one roof, are all one house or building. The latter view would concede even more than the Crown contends is right and would still further increase the unit of assessment.

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(1) 1 Ex. D. 469, 480.
(2) Ibid. 482.
(3) L. R. 7 Q. B. 90.
(4) L. R. 7 Q. B. 90, 95.
(5) L. R. 10 Ex. 305; 1 Ex. D. 469.

In my view, the Commissioners in finding as a fact that the words "house or building" may properly be confined in the circumstances to those properties which are served by a common staircase have made no error in law. Mr. Latter would appear to concede that if the common staircase has a front door on the street, the group of flats become one house or building, but, he says, that the absence of any such outer door turns the staircase, or, it may be on the ground floor the passage, into a mere way so that each flat becomes its own house. He relies upon certain dicta, particularly the observations of Lord Halsbury in *Grant* v. *Langston* (1), where the learned Lord Chancellor says: "An outer door and a common or separate staircase have been most commonly the tests applied, and I am not myself able to see how the case of chambers in an Inn of Court and the decision of the *Westminster Case* (2) are reconcilable with each other." Now in the *Westminster Case* (2) there was a street door locked at night. In the case of chambers in an Inn of Court there is no street door, so that the learned lord does not appear to attempt to reconcile these cases on the ground of absence or presence of a door, but pronounces them irreconcilable: I read his words "an outer door and a common or separate staircase have been most commonly the tests applied" to be used disjunctively—meaning that either of them offers a test. I do not think, with every respect, that the ancient case of *Evans and Finch* (3) (a criminal case which decided apparently that chambers in the Temple were a domus mansionalis so that benefit of clergy could be denied to one who broke into the house) is of any assistance in this matter. But it is significant to notice that in the case of house tax in r. 4 of 48 Geo. 3, c. 55, Sch. B, it is

(1) [1900] A. C. 383, 392.
(2) 1 Ex. D. 469.
(3) (1637) Cro. Car. 473.

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specifically provided that every chamber or apartment in any of the Inns of Court or of Chancery being severally in the occupation of any person shall be charged thereto as an entire house, which appears to indicate the necessity for stating in terms that such chambers shall be so regarded. The *Tontine* case (1) also supports this view. It has been pointed out to us that in *St. Marylebone Assessment Committee* v. *Consolidated London Properties, Ld.* (2), a block of buildings made up of flats was assumed by their Lordships to be a house for the purpose of interpreting Sch. III. of the 1869 Act, and, to my mind, it is clear that the house or building in this case is, to use the language of Lord Halsbury, that having "a common or separate staircase." It follows, therefore, that the house or building is just that unit which has been selected for assessment and charge by the Crown and that, as in my opinion the aggregation of the values of the component flats found under the Act of 1869 is not the ascertainment of the value nor anything affecting valuation, but merely an assessment and charge stated as to unit of ascertainment and personal liability, r. 8 (*c*) of No. VII. of Sch. A applies; that the assessment and charge should be made upon the landlord and that the assessment and charge as one entire house is rightly effected by adding together the values of the flats duly ascertained from the valuation list under the component 1869 Act.

This view is in accord with the judgment of Rowlatt J., and I am, therefore, of opinion that this appeal should be dismissed.

Romer L.J. In order to determine the questions raised by these appeals it is necessary to ascertain the true meaning and effect of No. VII., r. 8 (*c*), Sch. A, to the Income Tax Act, 1918. In order to do so it will be convenient in the first place to consider s. 36 of the Income Tax Act of 1853, which was practically in the same terms as and has now been replaced by the rule. Now s. 36 of the Act of 1853 was new. Under the Income Tax Act of 1842, where a house

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(1) L. R. 10 Ex. 305; 1 Ex. D. 469. (2) [1914] A. C. 870.

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or building was let in different apartments or tenements and occupied by two or more persons severally, the tax was assessed in respect of each set of apartments or tenement separately occupied. The Act of 1842 contained no express provision as to what the unit of assessment was to be in such a case, unless the house was divided into distinct properties: but inasmuch as the Act of 1842 provided that the tax was, in general, to be charged on and paid by the occupier, the unit of assessment under Sch. A was always treated as being the unit of occupation. Where, therefore, the whole of a house or building was in one occupation, the entire house was the unit of assessment, and its annual value was the rack rent of the house as a whole. But if the owner of the house or building happened to let it off in floors to separate tenants then, before 1853, each floor was the unit of assessment. The annual value or rack rent of the floor was separately ascertained, and the tax in respect of it was charged upon its occupier. But it is obvious that the aggregate of the rack rents of the floors might be a different sum from the rack rent of the house as a whole. The question therefore arises whether the effect of s. 36 of the Act of 1853 was not to make the unit of assessment in the case I have just been considering the unit it would have been had the house not been let off in floors but remained in one occupation. It is said on behalf of the Crown that the only effect of the section was to transfer the liability or the primary liability for the tax from the occupiers to the landlord, leaving the unit of assessment, and therefore the total amount of the tax, unchanged. But the section says that the house or building shall be charged as one entire house or tenement. I need not pause to consider whether there is any difference for this purpose between the word "charged" and "assessed," for they are used interchangeably in the Income Tax Acts: see observations of Lord Wrenbury in *Kensington Income Tax Commissioners* v. *Aramayo.* (1) In No. VII., r. 8 (c) of Sch. A, of the Act of 1918, moreover, the words are "assessed and charged" as one entire house or tenement. Looking then

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(1) [1916] 1 A. C. 215, 227.

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at the section, I find that though a house is in fact let in different apartments and would therefore but for the section be chargeable or assessable to income tax as more than one house, it is "nevertheless" to be charged or assessed as one entire house. The words seem to me to be plain, and unless there be some authority that prohibits me from so holding, I must, as it seems to me, arrive at the conclusion that in the case supposed in s. 36 of the Act of 1853, the unit of assessment and therefore the unit whose annual value would have had to be ascertained before the Valuation (Metropolis) Act, 1869, was the house or building as a whole.

But it is now necessary to turn to that Act to see to what extent (if any) the operation of the section in relation to lands, tenements or hereditaments within the "metropolis" was altered. The first section of that Act to which I need refer is s. 45. That section, so far as is material to be stated, provides, in effect, that the valuation list made under it shall be conclusive evidence of the gross value and of the rateable value of the several "hereditaments" included therein for (amongst other purposes) the purpose of any tax assessed in pursuance of the Income Tax Acts on any lands, tenements and hereditaments in all cases where the tax is charged on the gross value; and that in construing the Income Tax Acts with respect to Sch. A annual value shall be deemed to mean the gross value stated in such list. Sect. 75 provides that nothing in the Act shall in any way alter or affect the mode of valuing or taxing any hereditament which is not included in any valuation list. Sect. 76 enacts that "Where for the purposes of the Acts relating to the duty on inhabited houses, or to the duties charged under schedule B of the Income Tax Act, [1842], or to the sale of exciseable liquors, it is necessary to make a separate valuation of any hereditament by reason of its not being separately valued in any valuation list, the value of such hereditament shall be ascertained in the same manner as if this Act had not passed." Finally, s. 77 repeals the enactments specified in Sch. V. and so much of any other Acts as authorizes any valuation of hereditaments to be made for the purposes of any rate or tax in respect of which the valuation list is by that Act made conclusive. Included in Sch. V. is part of the Income Tax Act of 1853—namely, "sections 32 and 47 and so much of the rest of the Act as relates to the mode of ascertaining the value of any hereditaments with respect to the value of which the valuation list is conclusive." There is no doubt that this Act gives rise to some questions of difficulty in relation to the operation of s. 36 of the Act of 1853. For where a house or building within the area affected by the Act of 1869 is "let in different apartments or tenements, and occupied by two or more persons severally" the house as a whole does not appear in the valuation list nor is its gross or rateable value ascertained under that Act. If, therefore, as I think is the right view, the annual value of the entire house had to be ascertained in cases coming within s. 36 of the Act of 1853, it would have to be ascertained by the Income Tax Commissioners. For neither s. 45 nor s. 76 of the Act of 1869 would have any application. The relevant section of that Act would be s. 75.

It was, indeed, argued on behalf of the Company that the Act of 1869 repealed s. 36 of the Act of 1853 as being a part of that Act that related to the mode of ascertaining the value of hereditaments with respect to the value of which the valuation list is conclusive. This would be somewhat startling if true. In my opinion, however, the argument is unfounded. Whether s. 36 did or did not alter the unit of assessment in the cases to which it refers, it had nothing to do with the ascertainment of the value of any hereditaments in the valuation list, and it is with respect to these hereditaments alone that the list is made conclusive by the Act of 1869. For if the unit of assessment was not altered, then for the purpose of charging the landlord it was, in the case of the metropolis, only necessary to add together the gross values at which the several apartments or tenements appeared in the valuation list. If the unit of assessment was altered neither the entire house or building nor its value would appear on the list at all.

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I must now consider the contention advanced on behalf of the Crown that the construction I have placed upon s. 36 of the Act of 1853 is in conflict with the decision of the Court of Appeal, not indeed upon that section, but upon the provisions of another Act of Parliament alleged to be in pari materia. The Act in question was that of 48 Geo. 3, c. 55, and the case in question was that of *Attorney-General* v. *Mutual Tontine Westminster Chambers Association.* (1) The Act contained, in Sch. B, rules for charging inhabited house duty. The material parts of those rules are set out on p. 309 of the report of the case before the Court of Exchequer and I need not set them out here. It was held upon the facts of that case that certain blocks of buildings in Westminster were houses let in different tenements within the meaning of r. 6, and not in different tenements being distinct properties within the meaning of r. 14. The blocks therefore became chargeable to the duties as if inhabited by one person only and the landlord or owner of the blocks was to be deemed the occupier and charged with the duties. The further question then arose as to what the value of each block was to be taken at for the purpose of charging the duties. As to this, Cleasby B. said (2) that the value of each block was accurately represented by the aggregate sum of the values which appeared in the valuation list, which were of course the values of the separate tenements. Bramwell B., after referring to the Act of 1869, said (3): "For the purpose of the poor-rate it was necessary to assess each set of chambers separately; for the purpose of this tax it is necessary to add up the sums so separately assessed." Neither of the learned judges made any express reference to r. 7, but when the case came before the Court of Appeal Lord Coleridge C.J. suggested that this rule possibly furnished the reason for the decision. The Court of Appeal at any rate, in affirming the Court of Exchequer, seem to me to have based their judgments on this point upon the rule in question. Jessel M.R., however, did suggest

(1) L. R. 10 Ex. 305; 1 Ex. D. 469.

(2) L. R. 10 Ex. 305, 316.

(3) Ibid. 318.

another way in which the same result "might" be arrived at. After referring to the preamble of the Act of 1869 and to s. 45, he said (1): "So that if that section stood alone it would be conclusive. But then comes s. 76." With all possible respect I cannot see how s. 45 was conclusive if the question was as to the proper value to be placed upon the entire block as the unit of assessment. The block was not a hereditament included in the list, nor was its gross value inserted therein. Had it not been for s. 76, I should have thought that the value would have had to be ascertained under r. 11 of Sch. B of 48 Geo. 3, c. 55. Now as to s. 76 Jessel M.R. said (1): "It is said that, under those words, inasmuch as you have to value the house, and the house as such has not been separately valued in any valuation list, though each tenement composing the house has been so valued, it is necessary to make a separate valuation of one hereditament, namely, the house. One answer to that might be that the words 'separately valued' mean when you cannot ascertain its separate value; and that in the present case you can ascertain its separate value from the valuation list by adding up the value of all the tenements; in fact, that it is for this purpose separately valued, because you can ascertain without going beyond the list the total separate valuation of the hereditaments. It may be in two parts or in ten parts, but the total of the two or the ten parts does give you the separate valuation." But this was no more than a suggestion of what might be said. I cannot regard it as a decision that for the purposes of Sch. B and without r. 7 the value of the whole block was the aggregate of the values of the separate tenements. It may also be observed that there is no express provision in r. 6 of Sch. B that the house was to be charged as one entire house or tenement.

I have so far been considering the effect of s. 36 of the Act of 1853. But the considerations that have led me to the conclusion that I have expressed also compel me to put a similar construction upon r. 8 (*c*), No. VII. of Sch. A of the Act of 1918. It is true that No. VII. is entitled "Rules as

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(1) 1 Ex. D. 469, 481.

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to Persons chargeable." But the language of r. 8 (*c*) is in substance indistinguishable from that of s. 36 of the earlier Act, and must, as it seems to me, bear the same construction. It is, moreover, to be observed that r. 1 of No. VII. enacts that the tax shall in general be charged on and paid by the occupier, and as it is by reason of this rule that the unit of assessment is in general the unit of occupation, there can be no reason why r. 8 (*c*) should not be treated as making the entire building the unit of assessment in the cases to which it refers.

I must now consider the Company's contention that r. 8 (*c*) does not apply to hereditaments within the administrative county of London by reason of the general provision affecting the Rules applicable to Sch. A. Much of what I have already said in relation to their contention that s. 36 of the Act of 1853 was repealed by the Act of 1869 is also applicable to the present one. If the true construction of the rule be that it makes the entire house the unit of assessment instead of the separate tenements, there is nothing in it that affects the valuation, or relates to the ascertainment of the value, of any hereditament with respect to which the valuation list is made conclusive. As I have already pointed out, neither the unit of assessment nor its value appears in that list at all.

The next question to be decided is whether in the present case the various groups of tenements which have been respectively assessed are houses or buildings within the meaning of the rule. This question, however, is in my judgment concluded, so far as this Court is concerned, by the decision in the *Tontine* case (1) to which I have already referred. In that case this Court held that blocks of buildings each of which was divided up into flats that enjoyed a common staircase and a common doorway were houses within the meaning of r. 6 to Sch. B of the House Tax Act, 1808. There is nothing in the Income Tax Act of 1918 to suggest that the word "house" is used in any different sense from that in which it was used in the Act of 1808. Nor are the facts of the present case distinguishable in any material respect from the facts in that case. For where a group of flats is served by a common stairway it cannot in my judgment matter, for the purpose of considering whether the group is a house, that there is no door giving access to the stairway from the street. In these circumstances we ought in my opinion to follow the decision in question and hold that each group that has been separately assessed is a house within the meaning of the rule.

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(1) L. R. 10 Ex. 305; 1 Ex. D. 469.

For these reasons I have come to the conclusion that Rowlatt J. was right in holding that No. VII., r. 8 (*c*), of Sch. A applied to the present case and that the tenements in each group were rightly treated as forming one unit for assessment. But I very respectfully differ from him in holding that the annual value of each group was the sum of the gross values of the individual tenements appearing in the valuation list; for I think that the annual value should be independently ascertained under the Income Tax Act, 1918.

I express this opinion with great diffidence inasmuch as both Rowlatt J. and the other members of this Court take an opposite view. The question is not however of much practical importance so far as the Company are concerned. What they seek to obtain is an assessment of each tenement separately so that they may benefit in the event of any tenement being empty. I agree with Rowlatt J. and the other members of this Court that they are not entitled to this. The only advantage they would gain if my view had prevailed would be that the amount of the assessment would probably be less than the aggregate of the assessments of the different tenements, and they might obtain some advantage in the matter of the allowances.

Appeal dismissed.

JOHNSTONE (INSPECTOR OF TAXES) *v.* CONSOLIDATED LONDON PROPERTIES, LIMITED.

In this case the following Case was stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Kensington in the county of Middlesex.

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At a meeting of the above Commissioners held on November 21, 1927, the Consolidated London Properties, Ld. (hereinafter called "the Company"), appealed against eight assessments made under Sch. A of the Income Tax Act in respect of eight flats in their property known as No. 1 Linden Gardens, Notting Hill Gate, W., on the ground that they were entitled to allowances under Sch. A, No. V., r. 7 (1.) (*b*), of the Income Tax Act, 1918, as amended by the Finance Act, 1923, s. 28.

1. No. 1 Linden Gardens was a building which contained eight flats used for residential purposes and rooms resided in by a porter. All the flats were self-contained, and each flat was let to a separate tenant. These flats had separate front doors abutting on to a staircase inside the building which was common to all the flats. None of the flats communicated with any other. There was one entrance from the public street giving access to the whole building. A porter (who superintended the whole building) in the employ of the Company resided in rooms in the basements. The appeals were against the respective assessments in respect of the eight flats let to tenants. There was no appeal against the assessment of the rooms resided in by the porter. The corresponding allowance claimed by the Company in respect of the eight flats had in fact been made in respect of the porter's rooms, to which Sch. A, No. V., r. 7 (2.), as amended by the Finance Act, 1923, s. 28, sub-s. 3, did not apply, no rent being payable therefor, the Company being the occupier.

2. The property was within the area to which the Valuation (Metropolis) Act, 1869, applied, and in the valuation list in force during the year ended April 5, 1927, the gross value of each flat was shown separately, and the assessments now in question were in amounts which were the same as the respective gross values appearing in such valuation list.

3. Under its lease each flat was let on the terms that the rent hereinafter appearing was payable, and that the rates, cost of lighting the common entrance and staircases of the building by electricity and gas, the cost of the maintenance of the lift, and other parts of the building, and of the provision

of a porter and the cost of cleaning the common entrance and stairways was borne by the Company. In the case of two flats only did the tenants make a fixed contribution of 10*l.* per annum towards the lighting of the entrance and staircase and services of porters and use of lift, etc. The Company was liable for external repairs to the whole building. The tenants of six of the flats were responsible for internal repairs.

4. During the year of assessment the total rents payable under the leases of the flats amounted to 1471*l.*, and the additional payment by way of fixed contribution of 20*l.*, but details were at the appeal refused of particulars necessary to arrive at any outgoings which should by law be deducted in making the assessment.

5. The gross values of the eight flats and the porter's rooms appearing in the valuation list for the quinquennial period 1926 to 1930, and the amounts of the assessments made to income tax in respect of the year ending April 5, 1927, were :—

Flat 1, gross value, 75*l.* ; rent, 140*l.* Flat 2, gross value, 108*l.* ; rent 200*l.* ; Flat 3, gross value, 88*l.* ; rent, 163*l.* Flat 4, gross value, 118*l.* ; rent, 220*l.* Flat 5, gross value, 127*l.* ; rent, 235*l.* Flat 6, gross value, 86*l.* ; rent, 160*l.* Flat 7, gross value, 113*l.* ; rent, 210*l.* Flat 8, gross value, 77*l.* ; rent, 143*l.* Porter's rooms, 8*l.*

6. On behalf of the Company it was contended :—

(1.) That the gross assessments of the eight flats as fixed by the Valuation Committee for the Royal Borough of Kensington were conclusive of the rents at which the flats might reasonably be expected to let during the quinquennial period, and were conclusive for the purpose of income tax under the Valuation (Metropolis) Act, 1869, during that quinquennial period, and that the actual outgoings during the three years ending April 5, 1928, were irrelevant.

(2.) That under r. 7 of No. V of Sch. A. of the Income Tax Act, 1918, as amended by s. 28 of the Finance Act, 1923, the Company were entitled to the appropriate allowances from the gross Sch. A assessment set out in para. (3.) of that rule for the purpose of collection.

7. On behalf of the Crown it was contended (inter alia) :—

(1.) That for the purposes of income tax under the Income Tax Act, 1918, Sch. A, No. VII., r. 8 (*c*), the whole of No. 1 Linden Gardens was the unit of assessment and assessable as such in one sum, and that under s. 45 of the Valuation (Metropolis) Act, 1869, such sum was the total amount of the gross values of the various flats (including the porter's rooms) appearing in the valuation list made under the last mentioned Act for the time being in force—i.e., 800*l*.

(2.) That in any event the figures before the Commissioners showed that there was no title to the reduction claimed, as by the Income Tax Act, 1918, Sch. A, No. V, r. 7 (2.), as amended by the Finance Act, 1923, s. 28, there was no title to the reduction of the assessment claimed where the amount of the assessment was less than the rent by a sum greater than the authorized deduction which would be allowable if the assessment were on the amount of the rent after deducting from such rent any outgoing which should by law be deducted in making the assessment.

8. In reply to the first contention on behalf of the Crown the Company contended that each flat was rightly assessed as a separate hereditament, and furthermore that whether this were so or not, the Valuation (Metropolis) Act, 1869, was conclusive as to the hereditaments in the present case, and that the deductions to be allowed in fixing the gross value might not have been the same, and in fact would probably have been greater if the whole of No. 1 Linden Gardens had been treated as a single hereditament.

9. The Commissioners were of opinion that the income tax assessments should follow the assessments as fixed under the Valuation (Metropolis) Act, 1869, and therefrom the appropriate deductions allowed for repairs in the case of each flat, and reduced the assessments by amounts arrived at in accordance with the scale in para. 3 of r. 7.

Rowlatt J. gave judgment as already stated on the points common to this and the preceding case and on the additional point raised in this case he accepted the contention of the Crown.

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The Company appealed. The appeal was heard on July 18, 21, 22, 1930.

Montgomery K.C. and *E. G. Palmer* for the appellants. Rule 8 of No. VII. of the Rules applicable to Sch. A of the Income Tax Act, 1918, does not apply to the Metropolis in view of the provision in the General Rule applicable to Sch. A that "Nothing in these rules shall affect the valuation of lands, tenements or hereditaments within the administrative county of London with respect to which the valuation list under the Valuation (Metropolis) Act, 1869, is by that Act made conclusive for the purposes of income tax" and that any rule "which relates to the ascertainment of the value of such lands, tenements or hereditaments shall not apply within the administrative county of London" with an immaterial exception. Rule 8 is a rule affecting the valuation or alternatively a rule relating to the "ascertainment of the value" and therefore does not apply in London.

Again Rowlatt J. was wrong in holding that the self-contained flats are tenements in a house or building: see *Grant* v. *Langston* (1) and *Ilford Park Estates, Ld.* v. *Jacobs.* (2) The word "building" in r. 8 (*c*) cannot be extended to include more than one house, and these self-contained flats are just as much separate houses as if they were approached directly from the outside instead of through covered passages. They are not comparable with apartments, for the full and exclusive ownership of each flat is in its occupier.

In regard to the question whether there is a right to a deduction for repairs under No. V., r. 7 (1.) (*b*), of Sch. A, although the rent actually received was in excess of the assessments by a sum greater than that permitted by r. 7 (2.), Rowlatt J. followed his own previous decision in *Metropolitan Properties Co., Ld.* v. *Dunham* (3), holding that r. 7 (2.) applied to property within the Metropolis. It was suggested that r. 7 (2.) was in the nature of a proviso to r. 7 (1.) so that the two parts of the rule must be taken together. But there is no reason why a proviso

(1) [1900] A. C. 383.
(2) [1903] 2 Ch. 522.
(3) (1929) 14 Tax Cas. 740.

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should not have a more limited application than the substantive provision. Rule 7 (2.) is however a substantive enactment dealing with the amount of assessment and is a rule dealing with the ascertainment of value so as to be inapplicable to London. There is nothing however in r. 7 (1.) to prevent its application to London.

Sir William Jowitt A.-G. and *R. P. Hills* for the respondent. Rule 8 (*c*) of No. VII. of Sch. A applies to London. No. VII. consists of "Rules as to Persons chargeable" and has nothing to do with value. Rule 8 (*a*) is constantly applied to London. Rule 8 (*c*) relates to the person chargeable and the mode in which he is to be charged. It neither affects values nor has to do with their ascertainment. The provision that a house let in different tenements shall be assessed and charged on the landlord as an entire house in no way affects value. The various tenements have their values fixed by the Valuation (Metropolis) Act, 1869, and the value of the house as a whole is the sum of the values of its parts. The rules in question were not new rules in the Income Tax Act, 1918, but were old provisions in respect of which the same question had arisen in regard to inhabited house duty. It is true that the 1918 Act for the first time expressly excluded the application of certain rules to London. Before that Act, they could only be excluded on the ground of their inconsistency with the Valuation (Metropolis) Act, 1869: see *Attorney-General* v. *Mutual Tontine Westminster Chambers Association.* (1) The words with regard to inhabited house duty in r. 14 of Sch. B of 43 Geo. 3, c. 55, are almost identical with those in r. 8 (*c*) of No. VII. of Sch. A of the Act of 1918. The case in regard to rating—*Reg.* v. *St. George's Union* (2)—is distinguishable, as was pointed out by Blackburn J. (3) In *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (1) it was decided that 117 flats should be assessed in seven blocks for inhabited house duty, and it was further decided that the value of each block should be ascertained by adding the values in the valuation list of the

(1) L. R. 10 Ex. 305; 1 Ex. D. 469.
(2) L. R. 7 Q. B. 90.
(3) L. R. 7 Q. B. 95.

separate tenements. That is exactly in point here and shows that r. 8 (*c*) has nothing to do with value. It is true that in *Grant* v. *Langston* (1) Lord Halsbury questioned the reasoning of Jessel M.R. in the *Tontine* case (2), but his 'criticism related merely to the over-wide use of the word "house" and he in no way disapproved the decision of the Court in that case. That a house containing self-contained flats is a "house . . . . let in different . . . . tenements" is shown by *Western* v. *Kensington Assessment Committee* (3); *St. Marylebone Assessment Committee* v. *Consolidated London Properties, Ld.* (4)

[LORD HANWORTH M.R. The cases cited show that, if r. 8 (*c*) applies to London, the facts here bring the present case within the rule, and that the proper assessment is of the totality of the gross values of the separate flats in the valuation list.]

The view that this is the proper assessment receives support from the fact that in a case where r. 8 (*c*) does apply if the landlord is not available for assessment resort can be had to the respective occupiers of the flats. This shows that the assessment on the whole is easily capable of being applied to each part, and that can only be so if the proper assessment of the whole is the sum of the values of the separate tenements.

[LORD HANWORTH M.R. referred to *Kensington Income Tax Commissioners* v. *Aramayo*. (5)]

It has been decided in cases outside London that value of a house divided into separate tenements is "the aggregate of the rackrents at which each of the tenements was worth to be let separately by the year": *Williams* v. *Sanders* (6); see also *Embleton* v. *Norwich Union Life Insurance Society*. (7) If then the total value of the whole is equal to the sum of the values of the parts, r. 8 (*c*) has nothing to do with the ascertainment of the values and does not affect valuations.

(1) [1900] A. C. 383.

(2) L. R. 10 Ex. 305; 1 Ex. D. 469.

(3) [1908] 1 K. B. 811.

(4) [1914] A. C. 870.

(5) [1916] 1 A. C. 215, 226.

(6) 11 Tax Cas. 673.

(7) 11 Tax Cas. 681.

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JOHNSTONE v. CONSOLIDATED LONDON PROPERTIES.

Lastly if r. 7 (1.) of No. V. applies to London, as it admittedly does, r. 7 (2.) must also apply.

Montgomery K.C. replied.

Cur. adv. vult.

Nov. 17. The following written judgments were delivered :—

LORD HANWORTH M.R. In this case it is unnecessary to give a separate judgment, for the decision we have just delivered in the case of *Towle* v. *Improved Industrial Dwellings Co., Ld.*, covers the first two points contended for on behalf of the Crown before the Commissioners.

On these two points we hold accordingly that the judgment of Rowlatt J. is correct, and his order to remit the case to the Commissioners with a direction must be affirmed.

There remains, however, one other point raised by Mr. Montgomery on which, in deference to his argument, I desire to add a very few words.

In my judgment No. V., r. 7 (1.) (*a*) and (*b*), relate to deductions. These are to be made from the assessment, based on the valuation under the Act of 1869 for the purposes of collection. They are not rules which are excluded from operating in London, by reason of the words preliminary to the rules themselves already referred to in my judgment delivered in the other case.

Mr. Montgomery agrees that some part of No. V., r. 7, applies to London—namely, r. 7 (1.) (*b*), but argues that r. 7 (2.) does not apply to London because it affects valuation, or that if it does, a special meaning must be attached to the word " rent."

I accept what Rowlatt J. has said on this point. It is an abstruse one ; but I think the whole of r. 7 of No. V. relates to deductions from a value already otherwise ascertained, and so is not a rule which is excluded as one relating to valuation. It relates to a system of reducing by deductions the calculations made. The appeal on this point also fails and must be dismissed with costs. The order will be as stated by Rowlatt J., with the consequence that if it is necessary in the course of the Commissioners' reconsideration of the Case, the appellants must produce the figures and make a return as may be required for the purpose.

Slesser L.J. I agree entirely with the judgment of the Master of the Rolls and have nothing to add.

Romer L.J. It was held by Rowlatt J. in this case that No. 1 Linden Gardens was a house or building let in different apartments or tenements within the meaning of Sch. A, No. VII., r. 8 (*c*), and he has accordingly remitted the Case to the Commissioners to discharge the separate assessments that they had made and raise one assessment on the whole building. In view of the facts stated in the Case, it follows from the decision of this Court in *Towle's* case that the learned judge was right in this holding and in making the order that he did. It also follows from that decision that the gross value of the whole building will be the sum of the gross values of the several flats as appearing in the valuation list. There remains, however, the point made by the appellants that r. 7 (2.) of No. V. of the Schedule does not apply to their case and that they are entitled to the allowances provided for by No. V., r. 7 (1.) (*b*), of the Schedule irrespective of the amount of the rents actually paid for the flats. Their contention is that r. 7 (2.) if applied to the present case would affect the valuation or relate to the ascertainment of the value of hereditaments with respect to which the valuation list under the Act of 1869 is by that Act made conclusive, and is therefore rendered inapplicable by the general provisions relating to the rules under Sch. A. In my opinion this contention is ill-founded. Rule 7 (2.) involves no valuation or ascertainment of value whatsoever. The values of the flats will be taken from the valuation list, and all that r. 7 (2.) requires is that those values shall be compared with the rents of the flats for the purpose of seeing whether the deductions referred to in r. 7 (1.) (*b*) shall or shall not be made. For this purpose no doubt the rents paid by the tenants for the flats themselves will have to

Romer L.J.

be ascertained, and the Commissioners will have to determine from information supplied to them by the appellants what the amount of the assessment would have been if based upon such rents after deducting from the rents any outgoing which would in that case have been deducted. This, however, is merely the calculation of a hypothetical figure for the purposes of comparison with the actual figures appearing in the valuation list. It does not affect the valuation or relate to the ascertainment of the value of the hereditaments in question in any way.

For these reasons I am of opinion that the appeal should be dismissed.

Appeal dismissed.

Towle (*Inspector of Taxes*) v. *Improved Industrial Dwellings Company, Ld.*

Solicitors for appellants: *Merrimans.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

Johnstone (*Inspector of Taxes*) v. *Consolidated London Properties, Ld.*

Solicitors for appellants: *Charles Stevens & Drayton.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. I. C.

KENYON *v.* STREET.

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Dec. 2.

Shop—General Closing Hours—Confectioners' Shops—Local Authority—Order—Earlier than eight o'clock—Order " inconsistent with the provisions of this Act "—Shops Act, 1912 (2 *Geo.* 5, *c.* 3), *ss.* 5, 6 *and* 7—*Shops (Hours of Closing) Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 33), *ss.* 1, 2, 3, 4 *and* 5.

In 1918 an order was made by a local authority under the Shops Act, 1912, ss. 6 and 7, for the closing of certain shops in the district, including confectioners' shops. The order fixed the closing hours as 8 P.M. on Friday, 9 P.M. on Saturday, and 7 P.M. on other week-days. The Shops (Hours of Closing) Act, 1928, provides (s. 1) that the general closing hours for shops shall be 9 P.M. on one day of the week and 8 P.M. on other days, but (s. 2) that in the case of confectioners' shops it shall be 10 P.M. on one day and 9.30 P.M. on other days. Sect. 2 further provides that a local authority may, in the case of confectioners' shops, substitute for either of these closing hours earlier hours, not being earlier than 8 P.M., if desired by the occupiers of a majority of shops to be affected by the order. Sect. 4 of the Act of 1928 provides that " Save as in this Act otherwise provided, nothing in this Act shall affect (*a*) any closing order in force at the commencement of this Act, fixing closing hours earlier than the general closing hours fixed by or under the provisions of this Act; or (*b*) the power of a local authority by a closing order made and confirmed in manner provided by the principal Act [the Shops Act, 1912] to fix, subject to the limits imposed by that Act, closing hours earlier than the general closing hours fixed by or under the provisions of this Act :—Provided that any closing order, whether made before or after the commencement of this Act, shall be of no effect in so far as it authorizes sales after the general closing hours fixed by or under the provisions of this Act or contains provisions inconsistent with the provisions of this Act " :—

Held, (by Swift and Acton JJ.; Avory J. dubitante), that the effect of the above provisions of the Act of 1928 was that confectionery shops should not be compelled to close before 8 P.M., and that as the order of the local authority in question directed the closing of confectioners' shops in the area at 7 P.M. it was inconsistent with the Act, and was void under ss. 2 and 4 thereof.

CASE stated by Manchester justices.

At the court of summary jurisdiction sitting at Strangeways in the City of Manchester an information was preferred by William Kenyon, Superintendent of the Lancashire County Constabulary (" the appellant "), under the Irlam Shops Closing Order dated June 20, 1918, made in pursuance of the provisions of the Shops Act, 1912, against Ernest Street, of 656 Liverpool Road, Irlam, in the County of Lancaster, a sweets and tobacco dealer ("the respondent"), for that he on March 13, 1930, in the said Urban District of Irlam, then being a retailer of sweets and tobacco at and on the premises, No. 656 Liverpool Road, Irlam, did unlawfully act in contravention of the Irlam Shops Closing Order, in that he at the hour of 8.40 P.M. on the said day did sell to one William Robertson one quarter of a pound in weight of "Mackintosh's Toffee," contrary to the form of the order in such case made and provided, which information was heard on May 22, 1930, when the said Court refused to convict and dismissed the information.

Upon the application of the appellant the justices stated a case for the opinion of the Court, which, so far as material, was as follows :—

On Thursday, March 13, 1930, at Irlam in the County of Lancaster, the respondent then being a retailer of sweets and tobacco did sell at and on the premises known as No. 656 Liverpool Road, a quantity of sweets, to wit, one quarter of a pound in weight of "Mackintosh's Toffee" to one William Robertson. The sale of these sweets by the respondent took place at the hour of 8.40 at night. On the date of the offence the Irlam Shops Closing Order, made in pursuance of the provisions of the Shops Act, 1912, and duly confirmed by the Secretary of State on June 20, 1918, was in existence, which order applied to all shops within the Urban District of Irlam in which is carried on the retail trade or business of (inter alia) a dealer in sweets, chocolates and similar confectionery, and the said order fixed the closing hours for such shops at 7 P.M. on Mondays, Tuesdays, Wednesdays and Thursdays, 8 P.M. on Fridays, and 9 P.M. on Saturdays except where otherwise expressly provided.

For the appellant it was contended :—

That there was a breach of the said order ; that the order was valid and binding ; that the proviso to the Shops (Hours of Closing) Act, 1928, s. 2, empowering a local authority to substitute for the general closing hours laid down in that section an earlier hour not being earlier than 8 P.M., if satisfied that this was desired by a majority of occupiers, was a power in addition to and not inconsistent with the power of the local authority to make closing orders fixing an hour not earlier than 7 P.M. under the procedure laid down in the Shops Act, 1912; that there still exists by virtue of s. 4 of the Act of 1928 the power under the Shops Act, 1912, to make an order fixing closing hours earlier than 8 P.M. for the sale of sweets and confectionery; that the Act of 1928 did not render inoperative or revoke the said order; that the order was in force and binding on shopkeepers and/or their agents for the closing of all the classes of shops therein mentioned at the hours specified and was not inconsistent with the provisions of the Act of 1928.

The respondent appeared and pleaded not guilty, and for him it was contended: That the Act of 1928 fixed general closing hours not later than eight o'clock in the evening; that the said Act provided special hours—namely, 9.30 P.M., for the closing of confectionery shops but enabled a local authority to make an order under the provisions of the proviso to s. 2 of the Act fixing the closing hour not earlier than 8 P.M.; that the provisions of the Act of 1928, s. 4, relating to existing orders and to the making of new orders under the Shops Act, 1912, were subject to the proviso that any such order should not contain provisions inconsistent with the provisions of the Act of 1928; that a provision requiring the closing of confectionery shops earlier than 8 P.M. was a provision inconsistent with the provisions of the Act of 1928; that the said order inasmuch as it required the closing of confectionery shops earlier than 8 P.M. was inconsistent with the provisions of the Act of 1928 and was therefore of no effect. (1)

(1) The Shops (Hours of Closing) Act, 1928, provides :—

Sect. 1, sub-s. 1: "Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than nine o'clock in the evening on one day in the week . . . . and not later than eight o'clock in the evening on any other day in the week, and those hours are in this Act referred to as the 'general closing hours.'"

Sect. 2: After providing that in certain shops, including confectioners' shops, the general closing hours shall be 10 P.M. on the late day and 9.30 P.M. on other days, continues: "Provided that a local authority may, in their area or in any part thereof, by order substitute for either of the general closing hours hereinbefore in this section mentioned an earlier hour, not being earlier than eight o'clock in the evening, if they are

The justices were of the opinion (i.) that there had in fact been a breach by the respondent of the said order if such were valid and binding; (ii.) that the said order was of no effect in so far as it required the closing of confectionery shops at 7 P.M., being inconsistent with the provisions of the Act of 1928, and that the respondent had in law committed no offence.

The question for the opinion of the Court was whether the justices came to a correct decision in point of law.

Ralph Etherton for the appellant. This involves the construction of the Shops Act, 1912, and the Shops (Hours of Closing) Act, 1928. The "general closing hours" under the Act of 1928, s. 1, are 9 o'clock in the evening on one day in the week, and 8 o'clock on other days. In the case of shops for the sale of table waters, sweets, chocolates, etc., the general closing hours (s. 2) are 10 o'clock on the late day and 9.30 on any other day, provided that the local authority may "in their area . . . . by order substitute for either of these hours an earlier hour, not being earlier than 8 P.M., if they are satisfied that such an order is desired by the occupiers of a majority of the shops affected." The Act of 1928 is in addition to and not inconsistent with the Act of 1912. Under the Shops Act, 1912, if the local authority were satisfied that a prima facie case had been made out for a closing order, notice had to be given and objections heard, after which they could make the order provided the occupiers of

satisfied that such an order is desired by the occupiers of a majority of the shops to be affected by the order."

Sect. 4: "Save as in this Act otherwise expressly provided, nothing in this Act shall affect (*a*) any closing order in force at the commencement of this Act fixing closing hours earlier than the general closing hours fixed by or under the provisions of this Act; or (*b*) the power of a local authority by a closing order made and confirmed in manner provided by the principal Act to fix, subject to the limits imposed by that Act, closing hours earlier than the general closing hours fixed by or under the provisions of this Act: Provided that any closing order, whether made before or after the commencement of this Act, shall be of no effect in so far as it authorizes sales after the general closing hours fixed by or under the provisions of this Act or contains provisions inconsistent with the provisions of this Act."

The principal Act above referred to is the Shops Act, 1912.

at least two-thirds in number of the shops affected approved the order. The order must then be submitted to the Secretary of State for approval. The procedure was thus more cumbrous than that under the 1928 Act, which is an amending Act only, and preserves by s. 4 (*a*) closing hours orders in force at the commencement of the Act of 1928, and (*b*) the power of local authorities under the Act of 1912 to fix earlier closing hours. The amendments made to the Shops Act, 1912, by the Act of 1928 are set out in s. 9 of the Act and in the Third Schedule thereto, but none of these affects orders made under the Act of 1912, which is described as the principal Act. The old procedure under the Act of 1912 is not inconsistent with the new, it is additional and supplemental. Under the Act of 1912, s. 5, sub-s. 2, the order of the local authority may fix the closing hour at any time not earlier than 7 P.M., and the Irlam Shops Closing Order, 1918, is within that limit. It is therefore valid within the Act of 1912, and is preserved by the Act of 1928. Apart from the existing order, which was made in 1918, the local authority still has power to make orders under the Act of 1912, provided the conditions laid down by that Act are observed: for the Act of 1928, s. 4, so provides.

P. M. Oliver for the respondent. The Act of 1928, s. 1, fixes the hours of closing for shops generally, and in respect of these the powers of local authorities are preserved by s. 4, which enables them to make closing orders fixing an earlier hour than 8 or 9 P.M. by means of the procedure in the Act of 1912. By s. 2, confectioners' shops are made the subject of special provisions fixing the closing hours as 10 P.M. on the late day and on other days 9.30 P.M. The proviso to the section enables the local authority to substitute an earlier hour, but not earlier than 8 P.M., provided that an order is made and that it is desired by the occupiers of a majority of the shops affected. There is no order here satisfying these conditions, and the order under the Shops Act, 1912, which it is here sought to enforce, is inconsistent with the Act of 1928, s. 2. Nor is this order saved by s. 4, because the proviso declares that a closing order shall be

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of no effect, which (inter alia) "contains provisions inconsistent with the provisions of this Act." The order here fixes 7 o'clock as the closing hour, whereas by s. 2 confectioners' shops are not to be ordered to close earlier than 8 P.M. Presumably the orders which are saved by s. 4 are only orders relating to the general body of traders, and not to confectioners.

Etherton in reply. It is admitted that a new order could not be made fixing 7 P.M. as the closing hour for confectioners' shops. But s. 4 is intended to preserve existing orders made under the provisions of the Act of 1912.

SWIFT J. This is a case stated by justices of the petty sessional division of Manchester raising a point under the Shops (Hours of Closing) Act, 1928. The facts are that the respondent, Ernest Street, was carrying on business at No. 656 Liverpool Road, Irlam, in the County of Lancaster, as a sweets and tobacco dealer, and on March 13, 1930, he, in contravention of the Irlam Shops Closing Order dated June 20, 1918, at 8.40 P.M., sold to William Robertson one quarter of a pound in weight of "Mackintosh's Toffee," and, as it was alleged, thereby committed an offence against the order.

It was contended upon his behalf that the order under which he was prosecuted was ineffective, being invalid in consequence of the provisions of the Shops (Hours of Closing) Act, 1928, and that he had committed no offence.

The magistrates were of opinion that there had in fact been a breach of the order by the respondent, if such order were valid and binding, but they were of opinion that the order is of no effect in so far as it requires the closing of confectionery shops at 7 o'clock, being inconsistent with the provisions of the Act of 1928, and that the respondent had in law committed no offence. The question raised by the case stated is whether or no they were right in law in the conclusion to which they came.

The determination of that question depends upon the construction of certain sections of the Shops (Hours of Closing)

Act, 1928, which follows upon and is to be read with the Shops Act, 1912, and the Shops Act, 1913. The Shops Act, 1912, which makes regulations for the conditions of employment, hours of employment and meal times, and closing of shops on particular days and at the particular times, provided in s. 5 for closing orders to be made by local authorities fixing the hours beyond which shops were not to be kept open. The procedure was laid down in the Act of 1912 (ss. 6 and 7) for the making of orders to carry out the views of the local authorities with regard to the closing of shops; and in pursuance of that Act, on June 20, 1918, the Secretary of State assented to an order to be known as the Irlam Shops Closing Order, providing for the closing of all shops within the Urban District of Irlam in which was carried on the retail trade or business of a grocer, provision dealer, dealer in sweets, chocolates, and a number of other specified trades, and that order provided in clause 2 that the shops to which the order applied should be closed on Monday, Tuesday, Wednesday and Thursday at 7 P.M., on Friday at 8 P.M., and on Saturday at 9 P.M.

That order remained in force and was still in force when the Shops (Hours of Closing) Act, 1928, was passed. That was an Act passed for the purpose of amending and supplementing the Act of 1912, and s. 1 provided that: "Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than 9 o'clock in the evening of one day in the week . . . ., and not later than 8 o'clock in the evening on any other day in the week, and those hours are in this Act referred to as the 'general closing hours.'" There was nothing in that section to prevent a local authority, acting under the powers conferred upon them by the Act of 1912, from fixing an earlier hour than 8 o'clock or 9 o'clock in the evening as the hour at which shops were to be closed. The section provided that the hour of closing should be not later than 8 o'clock on the ordinary evenings, and 9 o'clock on one day in the week, and that 8 o'clock and 9 o'clock were to be known as "the general closing hours." The local authority might under the Act of 1912 make an

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earlier hour than that, but it could not, under provisions contained in the Act of 1928, make a later hour than that.

That being the general closing hour fixed for all shops by s. 1 of the Act of 1928, ss. 2 and 3 of that Act selected particular classes of trades-people to be dealt with differently from the ordinary body. Sect. 2 declares: "Subject as hereinafter provided, as respects the trade or business of selling table waters, sweets, chocolates, or other sugar confectionery or ice cream, the general closing hours shall be 10 o'clock in the evening on the late day and 9.30 in the evening on any other day."

Had the Legislature stopped there, the position, to my mind, would have been exactly the same as is the position for other trades-people as regards the fixing of the earlier closing hour, that is to say, the Legislature fixed an hour beyond which a shop should not be kept open, and there was nothing to prevent a local authority from fixing an earlier hour at which the shop should be closed.

But according to the proviso to s. 2: "A local authority may, in their area or in any part thereof, by order substitute for either of the general closing hours hereinbefore in this section mentioned an earlier hour, not being earlier than eight o'clock in the evening, if they are satisfied that such an order is desired by the occupiers of a majority of the shops to be affected by the order." The effect of that clearly is, that whatever may be done with regard to ordinary trades-people, those who deal in confectionery cannot be ordered to close their shops before 8 o'clock in the evening, and at that hour only if a majority of the occupiers of the shops to be affected by the order desire that such an order shall be made. Therefore the Act expressly takes away from the local authority the power to make an earlier closing order in the case of confectioners than the hour of 8 o'clock, and only allows them to fix that hour under certain conditions.

Then s. 3 deals with another class of trades-people, and provides that "As respects the trade or business of selling tobacco and smokers' requisites, a local authority may, in their area or in any part thereof, by order substitute for the general closing hours fixed by this Act later hours, not being later than 10 o'clock in the evening on the late day or 9.30 o'clock in the evening on any other day, if they are satisfied that such an order is desired by the occupiers of at least two-thirds in number of the shops to be affected by the order." There, power is given to the local authority to extend the time during which a tobacconist's shop may remain open beyond the time during which an ordinary tradesman's shop may remain open; but unlike the case of the confectioner, no limitation is put upon the power of the local authority to fix an earlier hour at which the shop shall be closed, so that the confectioner stands alone in having a right to say, unlike the tobacconist and unlike the general body of tradesmen: "My shop shall not be ordered to be closed before 8 o'clock."

If that stood alone there would be no difficulty. The difficulty which the magistrates had to meet, and which has troubled me considerably throughout the argument in this case, is to be found in the provisions of s. 4 of the Act of 1928. That section is a saving section, intended to save closing orders that were in force at the time of the passing of the Act, and it provides that "Save as in this Act otherwise expressly provided, nothing in this Act shall affect (*a*) any closing order in force at the commencement of this Act, fixing closing hours earlier than the general closing hours fixed by or under the provisions of this Act." If that stood alone the effect of it would be that the order of June, 1918, fixing the hours of confectioners at 7 o'clock might be said to remain in force notwithstanding s. 2 of the Act of 1928, which provides that the hour of closing shall not be made earlier than 8 o'clock. But s. 4 (*b*) goes on to provide that nothing in the Act shall affect "The power of a local authority by a closing order made and confirmed in manner provided by the principal Act to fix, subject to the limits imposed by that Act, closing hours earlier than the general closing hours fixed by or under the provisions of this Act." Those two clauses of s. 4 might found the argument: "Here is an order in force fixing an hour of closing a confectioner's shop earlier than 8 o'clock, but s. 4 provides that nothing in the Act of 1928 shall affect an order which is already in force, and therefore the order is effective and must be observed." Then, in order to prevent that difficulty arising, s. 4 proceeds: "Provided that any closing order, whether made before or after the commencement of this Act, shall be of no effect in so far as it authorizes sales after the general closing hours fixed by or under the provisions of this Act, or contains provisions inconsistent with the provisions of this Act." Leaving out the words which seem to me not to be material for the purpose of deciding this question, that proviso reads: "Provided that any closing order . . . . shall be of no effect in so far as it . . . . contains provisions inconsistent with the provisions of this Act." Applying that to this case, I think that it means that this Act fixes the hour beyond which shops shall not be kept open. In the particular case of the confectionery business it also fixes an hour before which shops shall not be compelled to shut—namely, 8 o'clock. With regard to all businesses, except confectionery businesses, the local authority may fix any hour at which shops must shut, subject to the other provisions of the statute with which we are in no way concerned.

As soon as an order purports to compel a confectionery business to be closed at any earlier hour than 8 o'clock, it does something which is "inconsistent with the provisions of this Act," and is therefore not saved by s. 4, and is of no effect; for the Act of 1928, s. 2, provides that confectioners' shops shall not be ordered to be shut before 8 o'clock. Section 4, in saying that local authorities may maintain the orders which they have made fixing any earlier hour, is referring only to the general traders who are dealt with by s. 1, and when they deal with confectioners' shops under s. 2, if they make any provision for the hour of closing being earlier than 8 o'clock they are making a provision which is "inconsistent with the provisions of this Act," and is therefore void under s. 4.

For those reasons, in my view the magistrates were right in their conclusion. I do not think that there was any power in the local authority to compel confectioners to treat as their closing hour any hour earlier than 8 o'clock. The order which provided that they must close at 7 o'clock was therefore in my opinion void as against those carrying on the business of confectioners, and those who in defiance of or in spite of it carried on their business as confectioners beyond that hour were not committing any offence, and any charge against them on that heading was properly dismissed.

ACTON J. I am of the same opinion, and for the same reasons.

AVORY J. I have entertained much doubt in this case. I have now had the advantage of hearing the judgment of my brother Swift J., and as this is a case in which magistrates have refused to convict, I do not feel justified in differing from his judgment.

It appears to me that the Shops (Hours of Closing) Act, 1928, s. 4, is a mass of contradictions. It provides: "Nothing in this Act shall affect (*a*) any closing order which is in force at the commencement of this Act fixing closing hours earlier than the general closing hours fixed by or under the provisions of this Act." These words, at first sight, clearly would save the existing order, the Irlam Shops Closing Order, because that is a closing order in force at the commencement of the Act, and it fixes closing hours earlier than the general closing hours fixed under the provisions of this Act, and that would apply equally to ss. 1 and 2 of the Act. It then gives power to local authorities, notwithstanding the hours which have been fixed by this Act of 1928, to make closing orders after this Act has come into force, provided that they proceed under the Shops Act, 1912, and to make such an order as shall have in it closing hours earlier than the general closing hours fixed under the provisions of this Act.

So s. 4, having first of all enacted that an existing order which is inconsistent with the Act of 1928 shall nevertheless not be affected by it, and having also provided that the local authority may make a new order which will be inconsistent with the provisions of this Act, but that nevertheless that order shall not be affected by the Act of 1928, then provides that nevertheless any closing order, whether made before or after the commencement of this Act, shall be of no effect, if it contains provisions inconsistent with the provisions of this Act.

For the reasons pointed out by Swift J. I cannot help feeling that this order, the Irlam Shops Closing Order, so far as it relates to confectioners and sweet sellers, does contain provisions inconsistent with the provisions of the 1928 Act. I thought at one time that that difficulty might be overcome by the Shops Act, 1912, s. 5, sub-s. 3 (*c*), which provides that the order may "contain any incidental, supplemental, or consequential provisions which may appear necessary or proper." It seemed to me that it might be possible to limit the proviso to such provisions as are there mentioned, but upon further consideration I am unable to say that that proviso in s. 4 can be so limited, and therefore I do not dissent from the judgment of Swift J., in which my brother Acton J. has concurred, and the result is that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Greenwell & Co., for Sir George Etherton, Preston.*

Solicitors for respondent: *Wood, Lord & Co., Manchester.*

F. P. F.

onsidered. *In re*
OLLINS
[1950] 1 Ch. 498

In re J. M. CARROLL (AN INFANT).

C. A.
1930
Oct. 31;
Nov. 3, 17, 18;
Dec. 2.

Infant—Custody—Illegitimate Child—Rights of Mother—Custody of Children Act, 1891 (54 *Vict. c.* 3), *s.* 4—*Guardianship of Infants Act*, 1925 (15 & 16 *Geo.* 5, *c.* 45), *s.* 1.

Save as regards the respective claims of married parents as against one another, there has been no change of attitude on the part of the Legislature between the years 1891 and 1926 in respect of the wishes of the parents with regard to the custody of infant children. Notwithstanding that the Guardianship of Infants Act, 1925, has provided that the welfare of the infant is the first and paramount consideration for the Court in deciding a question with respect to the custody or upbringing of the infant, nevertheless the Court cannot, in the case of a child too young to have any views of its own, disregard the desire of its only parent unless that parent has so neglected his or her duty as no longer to deserve consideration.

So *held* by Scrutton and Slesser L.JJ. (Greer L.J. dissenting).

Semble, per Slesser L.J. Where a writ of habeas corpus is desired to issue to a corporation, it should not issue to the corporation eo nomine but to an officer thereof.

Judgment of the Divisional Court reversed.

APPEAL from an order of the Divisional Court dated July 22, 1930, refusing to order that a writ of habeas corpus should issue to a certain society—namely, The Homeless Children's Aid and Adoption Society and F. B. Meyer Children's Home (Incorporated), to have the body of Joan Margaret Carroll before the Court.

The judgment of the Divisional Court was a determination by way of appeal from an order made by Charles J. in chambers dated June 5, 1930, similarly refusing to order that the writ of habeas corpus should issue.

The following statement of facts is taken from the judgment of Slesser L.J.:—

The case is concerned with the custody of a very young child, Joan Margaret Carroll, who is the illegitimate offspring of one Ellen Carroll, a spinster. The child was born on April 14, 1929, and is therefore at the present time under two years old. It appears from the affidavits and the correspondence exhibited thereto that the child was born at a public institution called the Warkworth House, Isleworth. The mother was at all times a member of the Roman Catholic Church, and the child was duly baptized by a Roman Catholic priest, the Rev. Ralph Gardner, according to the rites of the Roman Catholic Church. Some time in October, 1929, the child then being nine months old, the appellant, Ellen Carroll, the mother, wrote to a Mr. Beesley, the secretary of the respondent society, asking him if he would kindly help to get the little girl adopted, and on October 31 Mr. Beesley answered that he would be pleased to help in any way he might be able.

The respondent society was incorporated on December 1, 1924, under s. 20 of the Companies (Consolidation) Act, 1908, as a company limited by guarantee not having share capital. The society is one which not only conducts a children's home at Wanstead, and places out children with foster parents, but also, a fact which immediately concerns this case, arranges for the adoption of children with whom the society keeps in touch by visitation until the child reaches the age of sixteen years. The society is a Protestant organization and brings up the children under its care and arranges for their adoption in a religious belief described by them as the Protestant Evangelical faith.

In his letter of October 31 Mr. Beesley enclosed a form which the appellant, Ellen Carroll, sent back filled up on November 2, 1929. That form is headed: "Particulars to be given by a mother . . . . on application for the admission of a child." In answer to the question: "Do you wish us to arrange for the adoption of the child?" Miss Carroll answered "Yes." To the question: "Has the child been baptized?" she replied "Yes." She also said that she was not able to contribute anything to the support of the child. Nevertheless above her signature appeared the words: "Should my child be received, I promise to make my payments regularly or remove my child if required at any time to do so." Mr. Beesley further says that in the form which she returned it appeared that the child was her second child; that she said she wished the society to arrange for the adoption, and, in answer to the question whether the child had been baptized she answered " Yes," but omitted to add whether Protestant or Catholic. It is fair to Miss Carroll to add that the form itself did not make any distinction as to kinds of baptism.

On November 23, a would be adopter applied to the society for particulars. The adopter was twenty-four and his wife twenty-seven. In November, 1929, he stated that he was in business on his own account, and also stated that he was prepared to bring the child up in the Protestant faith. On November 28 Mr. Beesley wrote to the appellant that : " We have some friends wishing to adopt a little one," and asked Miss Carroll to bring the little girl to his office on December 5, when the would be adopters would take the child back with them on a visit with a view to adoption. The appellant, according to the assistant secretary, Miss Agar, in fact attended at the office with the child on December 3. The child was then handed over to the prospective adopters and, after that, the appellant was called into the room and it was explained to her by Miss Agar that the child would be brought up in the Protestant Evangelical faith. The appellant on the other hand swears that no question was asked as to the religion of the child at any of the interviews, and that she did not fully realize what the effect of giving up all her rights to her child would be. She says that Mr. Beesley was not present on December 3. Miss Carroll then signed what is said to be a consent to an adoption order under the Adoption of Children Act, 1926, the name of the adopters being omitted, in which she consented to the making of an adoption order in favour of the applicant, no applicant's name appearing. She also signed a form of " mothers' guardianship agreement," the details of which were filled up by Miss Agar, which she handed to the society, agreeing not to interfere with the training, education or control of the child ; she agreed to sign the consent form which I have mentioned for an adoption order and undertook not to molest or interfere with any person connected with the society or persons having the care of the child.

The child then went to live with the adopter and his wife. The adopter subsequently expressed to Mr. Beesley the great pleasure of himself and his wife at the adoption of the child, and reported the child's progress from time to time to the society.

On December 7, 1929, Father Rusher, the Roman Catholic chaplain to Warkworth House, wrote to Mr. Beesley saying that the appellant was a Roman Catholic and that the child was baptized as such. He further stated that Miss Carroll was anxious that the child should be brought up in the faith of its baptism, and that she forgot this important point in her anxiety. On January 17, 1930, the adopter filled in the society's form of adoption agreement, which it was the intention of the society to use in applying to the Court for the adoption order to assist the adopter. This, Mr. Beesley says, would have been done, notwithstanding the fact that he had received on December 7 the letter from Father Rusher, but on January 23 Father Craven, the administrator of the Crusade of Rescue and Homes for Destitute Catholic Children, telephoned to Mr. Beesley saying that the mother was a Roman Catholic and that the child had been so baptized. On January 25, 1930, Miss Carroll wrote to Mr. Beesley saying that she wanted the child back so that she could arrange for it to be brought up in its own religion, and asking him to let her know where she could find her child and at what time she could arrange to have the child back. Correspondence followed between the plaintiff, Father Craven and Mr. Beesley, and on February 28, 1930, Mr. Beesley pointed out that the child was in the North of England; that he had assured the adopter and his wife that the child was given up entirely at the time she was handed over to him, and that he did not know that the child had been baptized into the Catholic Church at the time when he stipulated that it should be brought up in the Protestant Evangelical faith. On March 11 Mr. Beesley wrote to the adopters telling them that a claim had been made to the child by Miss Carroll and, in reply, they said that they would refuse to give up the child, as the child had gained their affection and they hers.

The plaintiff then appears to have changed her mind, for on March 24 she told Mr. Beesley that it would be best to keep the child where it was, and asked if her son Patrick, who was five, could also be adopted. Patrick is also illegitimate. According to Father Craven in one of his letters exhibited to an affidavit, shortly after, Miss Carroll said that she would give up writing to Father Craven altogether, and again asked Mr. Beesley to assist Patrick. These letters she wrote [according to Father Craven] "in a fit of pique." Finally, on March 28, Father Craven said that Miss Carroll had again altered her mind and that she wished to recover possession of the child. This attitude she subsequently maintained throughout these proceedings, and in her affidavit, dated May 6, 1930, she says that: "I find that I cannot be entirely separated from my daughter, as would be the case if the arrangements made with the defendant society were to continue. I have therefore applied to the Incorporated Society of the Crusade of Rescue and Homes for Destitute Catholic Children to take care of the child for me, and if they take the child I shall be given every opportunity of seeing her from time to time. Further, if the child is left in the custody of the persons with whom she now is, I find that she will be brought up in a faith other than that which I myself profess. The child was baptized as a Roman Catholic, and it is my earnest desire that she should be brought up as a Roman Catholic."

Two other affidavits, one by Father Craven and the other by a Mr. Carmody, explain what the Crusade of Rescue and Homes for Destitute Catholic Children are prepared to do for the child. In substance they say that the child, if handed over by the mother, would be taken under the care of that society; she would be entrusted to the care of a foster mother, carefully selected, and that when she reached school age she would go to a home staffed by Sisters of Charity, and that later opportunities would be given for her emigration, if she and her mother wished; that if the parent expresses a special wish the society would take steps to find

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an adopter, and that while in one of the homes or with foster parents special facilities are readily accorded to the parent to visit the child.

Until this case had reached the Court of Appeal the child remained physically in the care of the adopters. It has now been handed back to what merely for distinction I will call the Protestant Adoption Society, and the rule is moved against them. No question therefore arises as to the present custody of the child.

July 22. LORD HEWART C.J. This is an appeal from an order made by Charles J. in chambers dated June 5, whereby he refused to order that a writ of habeas corpus should issue directed to The Homeless Children's Aid and Adoption Society and F. B. Meyer Children's Home (Incorporated) to have the body of one Joan Margaret Carroll before a judge in chambers at these Courts. The question for this Court is whether that order ought to be reversed or varied.

The main facts of the case are tolerably clear. The child, Joan Margaret Carroll, is an illegitimate child born of Ellen Carroll, a spinster, on April 14, 1929. The correspondence and the affidavits to which our attention has been directed make it plain that very soon after the birth of that infant the mother, who was already the parent of an illegitimate son, was concerned about her maintenance and upbringing, and accordingly, after some correspondence, she took the appropriate steps before the close of that year, not merely to transfer the custody of the infant girl to the Homeless Children's Aid and Adoption Society and F. B. Meyer Children's Home, but also signed a consent to the adoption of the infant by certain adopters, a man and his wife, to whom the infant had been sent, as it is said, on probation. Afterwards, in the early part of this year, the intending adopters took further steps in the matter of the adoption, and we are told by Sir Thomas Inskip, and of course we accept the statement, that these adopters intended to proceed to complete, under the provisions of the statutes, the process of adoption of this infant. There came, however, or there appears to have come, a change of mind in the mother. She is a domestic servant, and no question has arisen as to her assuming for herself the care and control and upbringing of this baby, but at a comparatively late stage it appears to have occurred, or to have been suggested to her, that, as a Roman Catholic herself she had an interest in having her infant daughter brought up in the Roman Catholic faith. I need hardly say, as has been said before in cases of this kind, that this Court has no concern with any question, if question there be, of the competing merits of different religious faiths. The Court addresses its mind to no such problem as that. But the question which we have to decide is whether, having regard to the only relevant considerations, we ought to reverse the judgment at which Charles J. upon careful consideration arrived. He was called upon to exercise his discretion and, having heard the material facts, he came to the conclusion that the proper course was to leave this infant in the care and control of the adopters. Are we to say that that exercise of judicial discretion was erroneous? Now at the beginning of the interesting argument in this case, it appeared as if a good deal of ground might be covered and no little controversy might emerge, but the effect of the discussion has been, I think, to narrow down the real points at issue. It is conceded on both sides that the discussion in the correspondence has been carried on in excellent tone and temper. It is also conceded on both sides that those who, in any event so far as this question is concerned, would have the care and control of this child, are respectable and responsible persons. No question is raised as to the personal fitness and competence of the adopters, any more than any question is raised as to the excellent care which the child would receive if she were handed over to those to whom the mother might hand her over, an institution which has been referred to in the course of the argument. But, while it is admitted expressly, both in the documents and at the Bar, that these adopters are responsible and respectable people, it is argued that the mother's wishes for the custody of her child have first claim, and, therefore, that this order ought to be reversed.

Now it is possible, I think, to discern in the course of the last forty or fifty years some change in the attitude towards what may be called the mere wishes of the parent of an illegitimate child. If one looks for example at the case of *Barnardo* v. *McHugh* (1) in the House of Lords one finds in the speech of Lord Herschell (2) such a passage as this: "The desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shewn that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the Court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother." Mother's wishes, that passage seems to say, are primarily to be considered, and yet, if the benefit of the child requires it, the wishes of the mother are not by the Court to be acceded to. Then in contrast with that passage one must take into consideration not merely some passages in the Custody of Children Act, 1891, but also some passages in the Guardianship of Infants Act, 1925, where it is expressly laid down in s. 1 that "where in any proceeding before any court . . . . the custody or upbringing of an infant . . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

There seems to have been between these few years 1891 and 1926 a certain development of thought in this matter. Perhaps the contrast became more apparent than real, because there was probably never a time when the mere wish of the parent would have been allowed by the Court to supersede the real interest of the child. But addressing one's mind to

(1) [1891] A. C. 388.

(2) [1891] A. C. 399.

that question, what is really for the welfare of this child, a question, no doubt, sufficiently difficult for any individual or any Court to decide, I think that the contest has now come to this. As to respectability and responsibility, there is no dispute, and the adopters have been identified in a document handed by Sir Thomas Inskip to the Court and communicated by him to the members of the Bar who appear on the other side. If this infant be now handed back to the mother, it is not with the view that the mother herself should bring up that child to mature years, that course is not open to her, it is not practically possible. The effect of reversing the order made by Charles J. would be to hand over this child, not to the care of the mother, but to an institution, no doubt a most excellent institution, but nevertheless to an institution. What is urged on behalf of those who appear against this appeal is that other things being equal—no condition as to respectability or responsibility arises—it is a better thing that an infant girl should have the intimate care and affection of adopting parents in their own private house, continuing, it may be, long after the period when the care and control of any institution might reasonably be expected to last, than that the infant in tender years should become one of a great number of inmates of an institution, however excellent that institution may be. I think there is great force in that argument. I think there would be great force in the argument with reference to a child of either sex. But in my view there is greater force in the argument where the Court is dealing with an infant girl. It is said, or suggested, nevertheless, that the wishes of the mother about the Roman Catholic faith ought to be attended to. Now, as to that argument, I have only two observations to make. I have considered with care what has been said in the course of this case upon that point. I am not sure that it is easy to disengage the authentic and spontaneous wishes of the mother from these documents, but, assuming as I do for the present purpose that the desire of the mother that the child shall be brought up in the Roman Catholic faith is personally and deeply felt, nevertheless I cannot help observing that this mother consented to the adoption of the infant by other persons so that she might be brought up at their expense and in the Protestant faith. Even if the view of the mother were clear, and I doubt whether it is, I am not in the least satisfied that the welfare of this infant would best be consulted by taking her from the care in which she now is and handing her over, not to maternal care, but to institutional care and control.

For these reasons I have come to the conclusion that the judgment of Charles J. ought to be affirmed. He satisfied himself as to the personal fitness of the adopters. We have had the adopters identified for us, and it is common ground that they are fit and proper persons. In my opinion this appeal from the order of the learned judge in chambers ought to be dismissed.

Avory J. I am of the same opinion, and I have nothing to add.

Wright J. I agree, and I have nothing to add.

The mother, Ellen Carroll, appealed.

Sullivan K.C. and *Seuffert* for the appellant.

Sir Thomas Inskip K.C. and *E. G. Palmer* for the respondents.

The arguments sufficiently appear from the judgments.

Cur. adv. vult.

Dec. 2. The following judgments were read:—

Scrutton L.J. Ellen Carroll, the mother of a child Joan Margaret Carroll now nineteen months old, called hereafter "the child," obtained a rule nisi for a writ of habeas corpus addressed to a Society, the full name of which is "Homeless Children's Aid and Adoption Society and F. B. Meyer Children's Home (Incorporated)," hereinafter called "the Society," calling on the Society to show cause why a writ of habeas corpus should not issue to them directing them to produce the child to abide the order of the Court as to its custody. When the case came before Charles J. in chambers, after hearing affidavit evidence, he declined to make the order absolute. The Divisional Court on the same affidavit evidence affirmed the judge's order. The mother appeals to this Court; the circumstances are changed to this extent. At the time of applying for the writ it is extremely probable that the child was not in the legal custody of the Society, though she had been in that custody before the application for the writ. She was probably in the custody of two persons, husband and wife, who proposed to adopt her. The Society had declined to give the mother the name of the adopting parent, though they offered to disclose it to the Court. In these circumstances it was obvious on the authority of the decision of the House of Lords in *Barnardo* v. *Ford* (1) that the writ could not issue against the Society. This however would leave undecided the question which the parties wanted decided—namely, whether the custody should remain with the adopting parents or be transferred to the mother or persons nominated by her. Accordingly, to avoid another writ being applied for directed to the adopting parents, the Society got back the child into their custody, so that the merits could be decided in the present proceedings, and two further affidavits were filed.

The facts of the case were as follows: The mother Ellen Carroll, who at the age of twenty-seven had given birth to an illegitimate child named Patrick, had, on April 14, 1929, at the age of thirty-two, given birth to a second illegitimate child. The mother was a domestic servant and was at the time of the birth of Joan Margaret in the workhouse with her son Patrick. The mother was a Catholic, and shortly after birth the child was baptized by a Catholic priest in the rites of the Catholic religion. It appears that the Catholic authorities were proposing to find a Catholic home for the child, but according to their set policy, which is not to make things too easy for the mothers of illegitimate children, lest such mothers should be encouraged to rely on an illegitimate child being provided for as soon as born, they were not hurrying the matter. The mother, who desired to get out of the workhouse and work as a domestic servant, apparently got impatient and, hearing, probably from some one in the workhouse, of the Society and Mr. Beesley, its secretary, wrote at the end of October, 1929, to Mr. Beesley asking for help to get her little girl adopted. Mr. Beesley asked her to fill up a form, which she did, stating she wished the Society to arrange for the adoption of the child. The form did not ask, and she did not disclose, her religion. The form did ask whether the child was baptized, but not in what religion. I think it is obvious that in the future it would be desirable that these societies, whether Catholic or Protestant, should inquire into the religion of the parents, and into what religion, if any, the child had been baptized. On November 28, 1929, Mr. Beesley wrote informing the mother that some friends wishing to adopt a little one would be at the Society's office on a named day and perhaps might like to take the child back with them on a visit with a view to adoption. The letter stated that the mother must sign an agreement "giving baby up entirely for adoption," and also that the mother would not know the name and address of the adopting parents, but the Society would report to the mother the child's health and progress. Accordingly on December 5 the mother brought the child to the Society's office. The adopting parents saw the child; the mother did not see the adopting parents, and as Miss Violet Agar, assistant secretary to the Society, deposes in one of the fresh affidavits, the child was "handed over to the prospective adopting parents." Those parents signed an agreement that the child should be brought up in the Protestant Evangelical faith. Up to this time the mother had not been informed by the Society that according to the rules of the Society the child would be "brought up in the Protestant Evangelical faith." There is no evidence whether she knew this or not; and the Society did not know and made no inquiry what the religion of the parent was or into what faith the child had been baptized.

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(1) [1892] A. C. 326.

At the interview with the mother after the child had been handed over, Miss Agar explained to the mother a Mother's

Guardianship Agreement, and a "consent to adoption order." Miss Agar says she explained to the mother that it was a permanent surrender of her maternal rights, and that the mother fully understood it. As the mother is by the Poor Law Statutes under an obligation to maintain her child, it has been held that an agreement by her to surrender her rights to some one else is contrary to public policy and void: *Humphrys* v. *Polak* (1), a decision of the Court of Appeal. Such an effect can only be produced by an adoption order sanctioned by the Court under the Adoption Act, 1926. The consent of the mother to such an order of the Court is one of the matters which the Court must investigate. To prove such consent Miss Agar obtained the signature of the mother to a printed form of "consent to adoption order," none of the blanks in which were filled in. In particular the name and address of the adopting parents were not filled in. In my opinion this was a very unsatisfactory form of procedure. I do not think a form in which the mother consents to adoption by any one nominated by the Society without knowing whom, should be acted upon by any Court.

Two days afterwards, on December 7, the Roman Catholic priest in charge of the Mission which looked after the workhouse in which the mother was resident wrote calling the Society's attention to the fact that the mother was a Roman Catholic, the child baptized in that faith; that the Roman Catholic Mission was then trying to find a home for the child, and that "the mother is anxious that it should be brought up in the faith of its baptism." Mr. Beesley does not seem to have answered this letter; one would have thought that when he discovered that he had unwittingly arranged for the child of a Catholic mother baptized in Catholic rites to be brought up in the Protestant Evangelical faith he would have offered some explanation. As he did nothing, on January 23, he received a telephone communication from Father Craven, the head of the Crusade of Rescue and Homes for Destitute Catholic Children, in effect repeating the letter of December 7, and also a letter from the mother saying she

(1) [1901] 2 K. B. 385.

had not taken into consideration the fact that she should have insisted on the child being adopted by Roman Catholic people, and that she wanted the child brought back so that she could arrange for it to be brought up in its own religion. Mr. Beesley, to say the least, showed no eagerness to comply with the mother's request; he wrote that he would see the adopting parents when he went north at some later time, but they had grown dotingly fond of the child. It may be remarked that between December 5, the handing over, and December 7, when Mr. Beesley learnt of the Catholic parentage, the adopting parents had not much time to grow "dotingly fond of the child." Correspondence continued with no result, except that by February 28 Mr. Beesley had made up his mind, very sensibly in my opinion, not to arrange for the adoption of any more children baptized into the Catholic faith without communicating with Father Craven to see if there was any difficulty in the way. Father Craven also said that he "found it a good practice to enquire not only the faith of the child, but also of the parents. This course safeguards the rights of the child."

The next material change was that on March 24 the mother introduced a new complication by writing the letter of about that date. Apparently she wanted the boy Patrick adopted as well, and as Father Craven under his Mission's policy was not making it too easy for her, and was trying to get the girl back to Catholic charge, she endeavoured to get the Protestant Mission to relieve her: "while I have Patrick the Guardians will not let either of us out, so would be very thankful if you would hurry things along." It appears from Father Craven's letter of March 28, that when advised again as to her duty as a Catholic to her child by her religious advisers she withdrew her application as to Pat, and repeated her application for the girl. As the Society refused to restore the girl or to give the name and residence of the adopting parents, the writ was applied for by the mother, who swears an affidavit in support of it, though no doubt the eminent counsel who appear for her are provided by Catholic organizations, as are also the eminent counsel on the other side provided by the Society. It rather appears, as Lord Esher said in a previous case, that the writ of habeas corpus is being used not for the body, but for the soul of the child. The elder child Patrick is now in a Catholic home.

Sir Thomas Inskip, for the Society, while submitting his Society to the directions of the Court, put forward two matters for their consideration. First, he submitted that it was not clear that the mother really desired that the child should be brought up in the Catholic faith. He expressly disclaimed arguing that she was of such bad character that her wishes for the religious and social education of the child should not be considered. Both this Court and the Court below only know the mother by her affidavits and actions. The opinion I have formed of her is that when left to herself and pressed by the inability to get work due to the incumbrance of her two children she is chiefly anxious to hand over their custody to any one who will maintain them regardless of religion, but that when the spiritual advisers of her religion point out to her that her duty is to bring up her children in the religion she professes, she recognizes that duty and is prepared to act on it, and does so in applying for this writ. I take the same view of her as Lord Herschell did on very similar facts of the mother concerned in *Barnardo* v. *McHugh.* (1) That mother, originally a Catholic, had had the infant baptized both as a Catholic and a Protestant, had sent him to a Protestant school, had signed an agreement by which Dr. Barnardo was to have the custody of the boy for twelve years, but then coming into contact with Catholic advisers again " was persuaded that she was doing wrong in permitting her child, who had been originally baptized as a Roman Catholic, to be educated as a Protestant." Lord Herschell said (2) : " I therefore cannot regard the application for the habeas corpus as made otherwise than by her." I take the same view in this case.

In the second place Sir Thomas Inskip submitted that considering the proposals on either side for dealing with the child, that of his Society was more to the advantage of the child than that of the mother. The mother's proposal, backed by the Catholic Rescue Society, was that the child should be placed with a foster mother selected and controlled by the Catholic Rescue Society till she was of school age, when she would be transferred to the Roman Catholic Schools managed by Sisters of Charity until she was sixteen, when she might either be emigrated with the mother's consent and placed in a suitable situation in the Dominions till she was twenty-one, or established in a similar situation in England. Her mother would have access to her. Her religious education would be in the religion of her mother and her baptism.

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(1) [1891] A. C. 388.

(2) [1891] A. C. 400.

The Society's proposal is that if the Court permits she should be adopted by her adopting parents, whom the Society certifies to be respectable and competent, but of whose position this Court knows nothing. As to her future scheme of education this Court knows nothing; it does not know whether at school age she will be a day scholar or educated away from home. The mother will have no access to her. She will be trained in the "Protestant Evangelical religion." It is not stated whether this means the Established Church of England on its Evangelical side, or one of the Nonconformist denominations whose leaders are associated with the Society. I am under the impression that many Evangelical members of the Church of England would be much surprised to hear that their religion is the same as that of their Nonconformist brethren. Sir Thomas Inskip laid great stress on the advantage of a "home," as compared with life in an institution. In *Rex* v. *New* (1) this Court removed a child from a "home" with a foster parent who had looked after her "for many years," where she was attending a Church of England day school and a Baptist Sunday School and a Baptist Chapel, to an orphanage kept by Holy Cross Sisters (Anglican), because it was desired by the mother. I may add that it is not universally accepted that a "home" with no external education is the best thing for a child. Many home-brought-up children are spoilt and deprived of independent initiative.

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(1) (1904) 20 Times L. R. 515, 583.

The question, then, is what view is the Court of Appeal to take of these contending proposals and of the fact that two tribunals below have expressed an opinion in favour of the proposals of the Protestant Society.

In the case of the procedure by which the applicant for habeas corpus could go to each judge of the High Court in turn Lord Halsbury L.C. in *Cox* v. *Hakes* (1) states that each Court or judge was bound to consider the question independently and was not to be influenced by the previous decisions refusing discharge. We have recently held that the Court of Appeal has no original jurisdiction in habeas corpus, but can only act by way of appeal, and cannot even act then if the corpus has been discharged by the Court below. The procedure is all in favour of the liberty of the subject, and I think the Court of Appeal must approach the matter independently and not as a matter determined by the discretion of the Courts below. But if it were otherwise, the Court will always interfere with discretion if it is of opinion the Court below has not attached sufficient importance to some question of law. I think in the present case the Courts have not given sufficient attention to the question of the parent's right to control the religion of a very young child, too young to have any wishes of its own. As Lindley L.J. said in *Reg.* v. *Barnardo. Jones's Case* (2): it is not "the duty of the Court to insist that" the child "shall be brought up in the Protestant rather than in the Roman Catholic religion against the wishes of the mother." See also *McHugh's* case. (3)

When after the Judicature Acts the Court of King's Bench, which had previously acted on the strict common law view of parental rights, was enabled by the fusion of law and equity, the rules of equity prevailing, to add to its powers the equitable view of the Court of Chancery as representing the King as parens patriae, the Courts still vigorously enforced the right of the parents, especially of the father, to control the religious education of a young child. The *Agar-Ellis*

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(1) (1890) 15 App. Cas. 506, 514.

(2) [1891] 1 Q. B. 194, 212.

(3) [1891] A. C. 388, 399.

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cases (1) are a strong example of this. The conflict there was between a Protestant father and a Catholic mother, the father asserting his rights in a way which the members of the Court, as men, disapproved of. But in the latter case Cotton L.J. expressed his view thus (2): "It has been said that we ought to consider the interest of the ward. Undoubtedly. But this Court holds this principle—that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child." And Bowen L.J. expressed his view thus (3): "Now the Court must never forget, and will never forget, first of all, the rights of family life, which are sacred. I think all that could be said on that subject has been said far better than I could repeat it by Vice-Chancellor Kindersley in the case of *In re Curtis* (4), and the cases to which he there refers. Those are as to the rights of family life. Then we must regard the benefit of the infant; but then it must be remembered that if the words 'benefit of the infant' are used in any but the accurate sense it would be a fallacious test to apply to the way the Court exercises its jurisdiction over the infant by way of interference with the father. It is not the benefit to the infant as conceived by the Court, but it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can." But in that case the Court was so slow to decide anything as to religion adverse to the possible view of the parent that whereas Malins V.-C. had made an order that the children should be brought up as members of the Church of England, the Court of Appeal, while arriving at the same result, struck out this declaration, leaving the matter to the

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(1) *In re Agar-Ellis* (1878) 10 Ch. D. 49; (1883) 24 Ch. D. 317.

(2) 24 Ch. D. 334.

(3) Ibid. 337.

(4) (1859) 28 L. J. (Ch.) 458.

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discretion of the father. These cases, which excited strong feeling at the time owing to the rival claims of father and mother, were probably one of the causes which led to the insertion of s. 5 of the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), which provided that: "The court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just," and s. 4 of the Custody of Children Act, 1891 (54 Vict. c. 3), which provided that "Upon any application by the parent for the production or custody of a child, if the Court is of opinion that the parent ought not to have the custody of the child, and that the child is being brought up in a different religion to that in which the parent has a legal right to require that the child should be brought up, the Court shall have power to make such order as it may think fit to secure that the child be brought up in the religion in which the parent has a legal right to require that the child should be brought up. Nothing in this Act contained shall interfere with or affect the power of the Court to consult the wishes of the child in considering what order ought to be made, or diminish the right which any child now possesses to the exercise of its own free choice." I emphasize the passage "to secure that the child be brought up in the religion in which the parent *has a legal right to require* that the child should be brought up." In the present case unless the mother is of so bad a character that her wishes as to religion and education may be disregarded, a contention which was expressly disclaimed by Sir Thomas Inskip, in my view the mother has a legal right to require that the child shall be brought up in her religion in which the child has been baptized. As Collins M.R. said in *New's* case (1), the religious education of a child was a "question on which the mother had the right to decide. She was a member of the Church of England, and her view as to what sort of religious education she desired her child to have must prevail."

It was argued that the advantage of a home instead of an institutional training outweighed the disadvantage of the departure from the religion desired by the mother. It was said that an institution was "detrimental" to the child, so that the parent's wishes might be disregarded. The passage in Lord Esher's judgment in *Reg.* v. *Gyngall* (2) shows that the matter which entitles the Court to disregard the parent's wishes on the ground they are "detrimental" must not be merely one which the Court thinks better than the proposal of the parent, but a matter of essential importance, "very serious and important." I cannot regard the difference between home training and training in a respectable institution against which nothing can be said except that it is an institution, as sufficiently important to enable the Court to disregard the parent's wishes as to religion in the case of a child so young as to have no wishes of its own.

It is, I hope, unnecessary to say that the Court is perfectly impartial in matters of religion, for the reason that it has as a Court no evidence, no knowledge, no views as to the respective merits of the religious views of various denominations. But in my opinion it has this duty, where the character of the parent is not attacked, to give effect to the views as to religious education of the parent of a child too young to have intelligent views of its own. The responsibility for religious views is that of the parent, not of the Court. The Court should not sanction any proposal excellent in itself which does not give effect to the parent's views on education religious and secular. Those views are none the worse because they follow from the teaching of the parent's religious advisers. This is in my opinion the result of the cases to which we have been referred, and the Court will in my opinion be undertaking a dangerous and impossible task if it substitutes its own wishes and responsibility for the wishes and responsibility of the parent in the matter of religion.

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(1) 20 Times L. R. 584.

(2) [1893] 2 Q. B. 232, 242.

The Lord Chief Justice was apparently of opinion that there had been a change of thought and attitude in the last forty years towards the problem we have been considering. Except that the mother's wishes have been put on an equality with the father I can see no such change. The Act of 1886 seems to me similar to the Act of 1925, except that the equality of the parents is made more pronounced. We were not referred to any authority, and I have found none, where in the case of a young child the Court has disregarded the views of the only parent, except where that parent has so neglected his or her duty as to cease to deserve consideration, and Sir Thomas Inskip disclaimed such an attitude towards this mother. We were not asked to make any order under the Act of 1891 for the Catholic education of the child while with its adopted parents. It is probable that both sides would strongly object to such an order, the Catholic side because it desires the whole control of the child; the Protestant side because their Society does not exist to rear children in the Catholic religion.

This case seems to me one in which, according to the whole tenour of the authorities, the Court should give effect to the wishes of the mother as to the religion and education of her second child, her eldest child already being educated in a Catholic institution. I should take the same view if it were proposed that the child of a Church of England mother, baptized in the rites of the Church of England, should be brought up in a Catholic home in the Catholic faith, and the mother who originally assented now objected. The wishes of the mother should prevail.

I trust that the two societies concerned in this case, now that the difficulties of adopting children of a different religion have been brought to their attention, will take precautions that they do not accept the custody of a child who or whose parents are not of the religion with which they are associated, until they have ascertained that the society specially associated with the religion of the parents does not wish to or cannot deal with the case. Both societies are doing a good work in their respective spheres, and can divide the work between them without clashing or overlapping.

The Society for which Sir Thomas Inskip appears, which now has the custody of Joan Margaret Carroll, has asked directions from the Court as to the method in which that child should be dealt with. In my opinion the Court should direct them to hand over the child to its mother or her authorized representative.

The necessity for these proceedings has partly been due to the vacillations of the mother, partly to the failure of the Society to ascertain the religion of the child's parent and the facts as to the child's baptism before the Society took action with regard to the child. In these circumstances there should be no costs of the proceedings here or below.

GREER L.J. This is an appeal from the judgment of the Divisional Court dismissing an appeal from Charles J., who had refused to order that a writ of habeas corpus should issue directed to the Homeless Children's Aid and Adoption Society and F. B. Meyer Children's Home (Incorporated), to have the body of Joan Margaret Carroll, an infant, produced. If the order had been made it would have still been possible for the Society when they brought up the body of the infant into Court to contend that its custody ought not to be transferred to its mother, the applicant, but should remain where it was, but in order to save multiplicity of proceedings the learned judge dealt with the question whether the applicant had made out a sufficient case to justify an order that the child should be removed from the custody of the Society, or those in whose custody the child then was, to the persons to whose custody the mother in her affidavit said she desired the child should be removed. The Divisional Court dealt with the question in the same way, and it was conceded in the hearing before us that it would be better to decide the question on this appeal rather than to make an order for the infant to be produced and leave the question of its custody to be determined after a return was made to the writ. Counsel's note of what Charles J. said on the hearing of the application to him was read to us, and from this it appears that he refused to make an order, because he was not satisfied that the application was really made on behalf of the infant's mother, Nellie Carroll, but was being made in her name by the Incorporated Society of The Crusade of Rescue and Homes for Destitute Catholic Children, of which Father Craven was administrator, and that he was not satisfied that the mother, the nominal applicant, had herself any real desire that her child should be removed from the custody of the two respectable people with whom she had been placed by the respondent Society with a view to her adoption under the Adoption of Children Act, 1926.

The Divisional Court decided to leave the child where she was, on the ground, as I understand the judgment, that the interests of the child would be best consulted by leaving her where she was so that certain inchoate adoption proceedings should be continued so that if an adoption order is made the proposing adopters would then be invested with the legal rights and subjected to the legal duties of parents of the unfortunate illegitimate child of the applicant. The Divisional Court were also influenced by a doubt as to the real wishes of the mother.

The facts established by the affidavits before the Court are as follows: The child was born on April 14, 1929, in the Warkworth House Infirmary. She was the illegitimate daughter of a domestic servant named Nellie Carroll, who had previously had another illegitimate child, a boy. There is nothing in the affidavits to show where the boy was born or whether the mother had shown the least anxiety with regard to the boy that he should be brought up in the Catholic faith, nor was there any evidence to show that the Roman Catholic chaplain at the workhouse or anybody representing Father Craven's Society had shown any anxiety to secure control over the boy's religious education, or had given the mother

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any advice about it, or that they had taken any steps to obtain the custody of either of the two children. For nine months after the birth of Joan Margaret Carroll her mother remained in the workhouse hospital with her two children, and apparently she was unable to leave so long as her children were there. At the expiration of nine months she, having apparently heard of the respondent Society, wrote a letter to them asking for their influence to get the child Joan adopted. They replied by sending her a form which requested information on certain particulars, and on November 2 she appears to have filled up the particulars requested by the form but without signing it. Then on November 28 she was informed that the Society had found some friends wishing to adopt the child, and asking her to bring the child to their office at 93 Westminster Bridge Road and they would arrange for the friends to see the child, and stating that they might like to take the child back with them on a visit with a view to adoption. On December 3 the applicant brought the child to the respondent Society's office. She was seen and approved by a respectable couple from the North of England who were willing to adopt her. The applicant did not see the proposed adopting parents. It was, however, explained to her, after the child had been handed over to the proposed adopters, that she would be brought up as a Protestant. The applicant then signed two documents, a consent to an adoption order being made, and a guardianship agreement. The names of the proposing adopters were not stated in either document, but there is no reason for doubt that at this time the applicant was quite willing that her child should be handed over to the proposed adopters, and that in due course application should be made for legal adoption, and that the child should be brought up in the Protestant faith. The child was taken away by the proposed adopters. The next thing that happened was that on December 7 a letter was received from the Rev. Francis Rusher, Roman Catholic chaplain of the workhouse hospital, stating that the child had been baptized by a Roman Catholic priest, and claiming that she should be brought up as a Roman Catholic. He stated that the mother had acted unknown to him, and that she was now anxious that it should be brought up in the faith of its baptism but had forgotten the important point in her anxiety. On January 25, 1930, the Society wrote a friendly letter to Father Craven, who had telephoned to them, in which it was stated that the adopting parents had become devotedly attached to the child, and suggesting that for the present the matter should remain in abeyance. On the same date the applicant signed a letter, which appears to me from internal evidence not to have been composed by herself, in which she said that she now wanted her child back so that she could arrange for it to be brought up in its own religion. After some further correspondence, to which it does not seem necessary to refer, the child's mother, by an undated letter about February 18, stated that she had just received a letter from Father Craven saying "he has a Catholic home waiting for little Joan and wishes me to write to you to ask you if Joan is coming back," and concluding with these words: "If she is coming back please let me know where to fetch her, also what time and day, as I cannot leave here until I have her back." On March 8 Father Craven wrote to the Society saying: "I think you know that I cannot in conscience desist from *my efforts* to persuade the adopters to hand over the child at the very earliest possible opportunity to *my* care" (the italics are mine). And in a later letter of March 20 the Reverend gentleman seems to base his application not so much on the wishes of the mother as on the very definite rights of the child.

Then on March 23 the mother writes the following letter to Mr. Beesley: "Have kept you waiting for a reply, but have been thinking it would be best to keep Joan where she is and would be very grateful to you if you could fix my boy Patrick, who is five years old, into one of your homes, or if inconvenient to do that, could you get him adopted. Should be out of here months ago but owing to my boy Pat I am unable to go. So will be very pleased if you would send me a reply back stating about Joan and my boy Pat." This letter was acknowledged by Mr. Beesley, the respondents' secretary, expressing satisfaction that the mother had agreed to the girl remaining where she was, but pointing out how difficult it was for them to do anything with regard to the boy in view of the feeling of Father Craven about these matters, and advising her to write to Father Craven again. The mother replied on March 26 saying that Father Craven was not going to help her with the boy unless she received Joan back, adding, "so we have come to the conclusion that it would be best to give up writing to Father Craven altogether. They have turned very disgusted towards me," and again requesting that they would put her boy on their list. The next thing that happened was a letter from Father Craven saying he had been to see the mother and had ascertained "her real sentiments in the matter," and saying she had offered the child in a fit of pique because they would not immediately relieve her of her responsibilities. The child not having been returned to her mother or to the Institution presided over by Father Craven, solicitors were consulted, and on April 17, 1930, they wrote a letter demanding the return of the child. Application was then made for a writ of habeas corpus, and various affidavits were filed setting out the facts, including an affidavit sworn by the mother in which she stated that she could not maintain the child with herself, but wished her to be handed over to the Institution known as The Incorporated Society of The Crusade of Rescue and Homes for Destitute Catholic Children, on the ground that she did not want to be entirely separated from her daughter, and on the ground that it was her earnest desire that she should be brought up in the Roman Catholic religion. She was obviously a woman without means and incapable of paying solicitors' costs or of incurring the expense of the eminent counsel who represented her in the present proceedings.

It was contended on behalf of the appellant that the judgment of the Court below did not attach adequate weight to the wishes of the mother, and that nothing was proved which would be sufficient in law to outweigh the prima facie right of the mother of an illegitimate child to put the child in charge of those whom she desired to look after it. A number of cases were cited, but I do not think there is any room for doubt as to what the law is relevant to the question we have to determine. Before the Judicature Act the position in the Common Law Courts was quite clear. The parents were entitled to the custody of their children unless it was proved that they had been guilty of misconduct which rendered them unfit to be entrusted with such custody. The powers of the Court of Chancery were greater than the powers of the Common Law Courts. As pointed out by Lord Esher in *Reg.* v. *Gyngall* (1), that Court was placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and had to exercise its jurisdiction in the manner in which a wise, affectionate and careful parent would act for the welfare of the child. The jurisdiction of the Court, it was pointed out, is not confined to cases where there had been misconduct on the part of the parents, but applies where it is clearly right for the welfare of the child in some very serious and important respect that the parent's right should be suspended or superseded. The effect of the judgment in *Gyngall's* case (2) is clearly and, I think, accurately summarized by FitzGibbon L.J. in *In re O'Hara* (3), where he says: "The following principles appear to be settled:—1. At Common Law, the parent has an absolute right to the custody of a child of tender years, unless he or she has forfeited it by certain sorts of misconduct; 2. Chancery, when a separate tribunal, possessed a jurisdiction different from that of the Queen's Bench, and essentially parental, in the exercise of which the main consideration was the welfare of the child, and the Court did what, on consideration of all the circumstances, it was judicially satisfied that a wise parent, acting for the true interests of the child, would or ought to do, even though the natural parent desired and had the Common Law right to do otherwise, and had not been guilty of misconduct; 3. The Judicature Act has made it the duty of every Division of the High Court to exercise the Chancery jurisdiction; 4. In exercising the jurisdiction to control or to ignore the parental right the Court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded." This statement in my judgment contains all the law relevant to the decision of this case. The question we have to decide is one of fact not of law.

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(1) [1893] 2 Q. B. 232, 241, 242.

(2) [1893] 2 Q. B. 232.

(3) [1900] 2 I. R. 232, 239.

O'Hara's case (1) was greatly relied upon by counsel for the appellant, but on its facts it is clearly distinguishable from the present case. The choice of the Court in *O'Hara's* case (1) lay between a good home provided for a legitimate child by strangers with whom the mother, when she had no home of her own, had made an agreement giving up her child to their custody, and an equally comfortable and respectable home provided by the mother in which she desired to have the control and upbringing of her child. It was not a contest, such as the present case, between a home on the one hand and institutional treatment on the other. For my part, I am judicially satisfied, as the Divisional Court was, that the welfare of the child requires that, if possible, it should be brought up in the atmosphere of a respectable home under the control of respectable and kindly people who are willing to undertake the responsibility of parents to her, rather than that she should be brought up for a few years by a paid foster mother who may have other children to look after, and afterwards brought up in an Institution.

The appellant's counsel also relied very strongly on the case of *Rex* v. *New.* (2) The facts of that case also are distinguishable from the present case. The question was not concerned with the custody and upbringing of a child of eighteen months, but with the custody and education of a child of twelve years of age, and there was in that case no possibility of the persons, in whose custody the child was, becoming adoptive parents of the child under the same liability in law of providing for it as if they were the real parents. That case is a decision on its facts, and in my

(1) [1900] 2 I. R. 232.

(2) 20 Times L. R. 515, 583.

judgment it does not compel this Court to give a similar decision on the different facts of the present case.

In *Barnardo* v. *McHugh* (1) the House of Lords had to consider the way in which the question should be approached with regard to an illegitimate child. In his speech in the House of Lords Lord Herschell uses these words (2), after referring to the earlier case of *Reg.* v. *Nash* (3): "I think this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shown that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the Court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother." I do not myself see any distinction between this proposition and the proposition that if it be shown that it would be advantageous to the welfare of the child that it should be put in the custody of somebody other than its mother, the Court would be entitled to refuse to hand the child over to its mother or to the persons in whose custody she desired it to be.

According to Lord Esher's judgment in *Reg.* v. *Gyngall* (4), in order to justify an order interfering with the prima facie right of the mother to determine the custody of her child, the Court must find that it is "clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded." This is a question of fact, and in my judgment there was ample evidence in this case to justify the refusal of Charles J. and of the Divisional Court to order the child to be delivered up to Father Craven's Institution in accordance with the wishes expressed by her mother in her affidavit. It seems to me unnecessary to decide whether we agree with the view of Charles J. that the application in this case is not really the application of the mother at all, but the application of the

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(1) [1891] A. C. 388.

(2) Ibid. 399.

(3) (1883) 10 Q. B. D. 454.

(4) [1893] 2 Q. B. 232, 242.

Incorporated Society of The Crusade of Rescue and Homes for Destitute Catholic Children. Even treating the application as one really made by the mother, and directing my attention to the question whether in serious and important respects the welfare of the child will be better secured by a decision which will make it possible for the proceedings for adoption to be continued so that, if the Court to which the application is made thinks right, an order will be made which will secure to the child all the benefits that she would have had if she had been the legitimate offspring of respectable and devoted parents, I still think the application for habeas corpus should be refused. If the Court makes the order asked for by the appellant the child will be put in charge of a paid foster mother, she will be in the position of a lodger and will not be under the control of her mother, but no doubt will be under the supervision of some representative of The Crusade of Rescue. At the age of five, unless her mother changes her mind again, she will be put into an Institution, where no doubt she will be wisely and kindly treated, but where she will inevitably miss the happiness and material advantages which are attendant on an upbringing in a good home. On the other hand, if the adoption proceedings result in an order, she will have all the advantages of home life, she will have two respectable people to act in all respects as her parents, with all the legal rights and obligations of parents, and will be brought up in an atmosphere surrounded by affection which need not necessarily be inconsistent with wise discipline. In my judgment the advantages to the welfare of the child are preponderantly in favour of leaving her where she is, until it is ascertained whether an adoption order will be made. If no adoption order is made, the respondents' counsel took upon himself the responsibility of saying that if the proceedings did not succeed the child would be delivered to the custody of those whom the mother says she desires to have charge of her child. In any event the situation would be different from what it is at present, and if no adoption order is made an application for habeas corpus might have a very different result from that which I think it ought to have at the present time. I do not think that we ought to decide in this appeal whether the Court to whom the application for an adoption order will be made ought or ought not to make such order. There may be difficulties in the way of obtaining such an order. I do not think they are insuperable, but in any case I do not think we should say anything to prejudge the question whether such an order ought or ought not to be made.

I have hitherto purposely made no reference to the question whether it is more or less advantageous for a child to be brought up in the Roman Catholic faith or the Protestant Evangelical faith. This Court ought to be quite neutral on a question of that sort, and should assume, as I do, that from a religious point of view the welfare of the child will be adequately provided for whether she be brought up in the one faith or the other. A point was made in the course of the argument, based on s. 4 of the Custody of Children Act, 1891, which refers to "the religion in which the parent has a legal right to require that the child should be brought up," and gives the Court power, where it thinks the parent ought not to have the custody of the child, "to make such order as it may think fit to secure that the child be brought up in the religion in which the parent has a legal right to require that the child should be brought up." It is to be observed that such an order is within the discretion of the Court but the Court is not bound to make it. The reference to the legal right of the parent does not, in my judgment, mean that there is a legal right to have the child brought up in any particular religion independently of the parental rights as a whole. Obviously there is such a right in a parent as long as the parent is the guardian of the child, and has its custody, but in my judgment it is not a separate and distinct right, but only one of the rights which are included in the parental rights of the parent who is the guardian of, and has the custody of, his or her children, and in any event if an application be made under s. 4 of the Act of 1891, the Court is not bound to make such an order, but is only entitled if in all the circumstances it thinks it right so to do. No application has been made to the Court in the present case to make the order referred to in that section.

It was said in the argument that the judgment of the Divisional Court delivered by the Lord Chief Justice was based on a misconstruction of the Guardianship of Infants Act, 1925. I do not think this is a justifiable criticism. In my opinion all that the judgment was intended to convey was that actually the attitude of public opinion and the Courts towards the powers of a parent over his children had become modified, and that nowadays less importance was attached to the rights of, and the wishes of, the parent, and more importance was attached to the welfare of the child, and the Act of 1925 was pointed to as an illustration of the modification in one instance of what at Common Law were the strict rights of a male parent. As the Lord Chief Justice says: "There seems to have been between . . . . 1891 and 1926 a certain development of thought in this matter."

For the reasons I have given, I think we ought to agree with the decision of the Divisional Court, and that this appeal should be dismissed, but as my brethren are of the contrary opinion the appeal will be allowed.

Slesser L.J. [after stating the facts set out above, continued:] It is a pleasant feature of this case that counsel on both sides respectively admit that both Catholic and Protestant Societies are satisfactory. Sir Thomas Inskip urges on behalf of the respondent society that at present the child is living in a private home in happiness and affection, and this is not disputed by Serjeant Sullivan, nor does Sir Thomas Inskip, on his side, dispute but that the child would receive care and attention from the Catholic Society. The criticism which Sir Thomas Inskip makes on behalf of the Protestant Society is, in substance, that the child is now living with private persons of good character who are prepared actually to adopt the child, so that they would become legally responsible for it, whereas if the child is taken from the Protestant Society and so, in effect, from the adopters, it will have to suffer institutional treatment of one kind or another, as the mother has admitted that she intends to hand over the child in such an event to the Catholic Society, though retaining the right of access.

Such are the material facts. The case has received exhaustive argument and consideration, all of which are fully deserved, for there can be no more serious subject for determination by a Court than the disposition of a fatherless child, and, in coming to the conclusion which I shall express, I am fully conscious of the gravity of the decision of the Court in that it must, of necessity, affect the whole of this child's future well being.

In my view, while the facts of every case must necessarily differ, we are not without considerable guidance in the principles which should influence us in coming to a determination of this difficult problem.

In my opinion, particularly having regard to the view expressed in the Divisional Court that recent legislation has invaded the old principles of law which used to determine these matters, this is a class of case where a somewhat close examination of the whole legal history of parental rights is not only justified but necessary.

In the first place it is well to consider the present state of the law with regard to the jurisdiction which is here invoked. The matter is put with great clarity by FitzGibbon L.J. in *In re O'Hara* (1) as follows: "At Common Law, the parent has an absolute right to the custody of a child of tender years, unless he or she has forfeited it by certain sorts of misconduct. Chancery, when a separate tribunal, possessed a jurisdiction different from that of Queen's Bench, and essentially parental, in the exercise of which the main consideration was the welfare of the child, and the Court did what, on consideration of all the circumstances, it was judicially satisfied that a wise parent, acting for the true interests of the child, would or ought to do, even though the natural parent desired and had the Common Law right to do otherwise, and had not been guilty of misconduct. The Judicature Act has made it the duty of every Division of the High Court to exercise the

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(1) [1900] 2 I. R. 232, 239.

Chancery jurisdiction. In exercising the jurisdiction to control or ignore the parental right the Court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded."

Kay L.J. in *Reg.* v. *Gyngall* (1) similarly points out how by reason of s. 25 of the Judicature Act, 1873, the Court can now exercise the original jurisdiction of the Court of Chancery as well as the old Common Law jurisdiction, and it is clear from these cases and from other authority that, on application by habeas corpus, the Court, although the parent has not been guilty of any misconduct to disentitle him to the custody of the child, may now, under its Chancery jurisdiction, if satisfied that it is essential for the welfare of the child, refuse to give the parent such custody. Lord Esher M.R., in *Gyngall's* case, says (2): "The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child. . . . . The Court may say in such a case that, although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate, and careful parent would not do." These observations were made in May, 1893, nearly two years after the decision of the House of Lords in one of the leading cases in this subject, *Barnardo* v. *McHugh*. (3) In that case Lord Herschell had taken a view similar to that of the Court of Appeal in *Gyngall's* case. (4) He says (5): "It is, however, no longer important to inquire what are the rights of the mother in relation to an illegitimate child at common law. All the Courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction. As was said by Sir George Jessel M.R. in *Reg.* v. *Nash* (6): 'In equity regard was always had to the mother, putative father, and

(1) [1893] 2 Q. B. 236, 248.
(2) Ibid. 241, 242.
(3) [1891] A. C. 388.
(4) [1893] 2 Q. B. 232.
(5) [1891] A. C. 398, 399.
(6) 10 Q. B. D. 454, 456.

relations on the mother's side.' In that case the mother of an illegitimate child sought to have it delivered to her in order that it might be placed under the care of her sister. The child was in the custody of the wife of a labouring man, with whom it had been placed by the mother, who was living with another man as his mistress. The Court, notwithstanding the opposition of the person in whose custody it was, ordered that the child should be delivered into the custody desired by the mother. I think this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shown that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the Court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother."

As the wishes of the mother are thus primarily to be considered, we have at the outset to give careful attention to the argument of Sir Thomas Inskip that the true wishes of the mother are not those expressed in her affidavits. I feel a great difficulty, in the absence of all suggestion of coercion, duress, fraud or any other element which would deprive the mother of the true exercise of her will, in coming to the conclusion that when an affidavit is sworn in so grave a manner as the present that the deponent does not mean what she says. But in deference to Sir Thomas Inskip's argument I do not conclude the matter in my own mind by the affidavits but consider other matter to which he drew attention. First, he argued that the vacillation of the mother, as appears from the evidence in handing the child to the Protestant society, then desiring it back, then again asking the Protestant society to take it together with its brother, and finally applying for a habeas corpus, show that the mother is exercising no true will. In the case of *Barnardo* v. *McHugh* (1) a very similar state of uncertainty prevailed. Lord Herschell (1), after reciting facts extremely similar to the present, saying that the mother was at one time indifferent whether the child was brought up as a Protestant or Catholic; that the child was baptized in a Roman Catholic chapel, and later baptized as a Protestant; that the mother afterwards caused the child to attend a Protestant school; and finally saying that it was manifest that the action of the mother proceeded from irritation, concluded: "I therefore cannot regard the application for the habeas corpus as made otherwise than by her."

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(1) [1891] A. C. 388.

The second suggestion of Sir Thomas Inskip is that in reality Father Craven was voicing the opinion of the mother and not the mother herself. It may well be that Father Craven had influenced the mother in thinking that she was wrong in consenting to her child being brought up in a faith other than her own. Certainly, she appears to be illiterate and many of the letters undoubtedly are phrased in language which suggests another hand and another mind; but taking into account all these elements, I come back to the fact that she has herself sworn that she desires access to her child and desires that it should be brought up in her faith and desires that it should be taken care of by the Catholic society. I think it would be unfair to Father Craven and the other priests of the society to assume that they have put forward her desires when they are not really her own. I prefer to believe her sworn testimony rather than to draw inferences on very inadequate data to her detriment and to the detriment of those who are supporting her by affidavit in the present case. (See the case of the *Hottentot Venus* (2), where the expressed wishes on affidavit of those who had the care of a female native of South Africa on habeas corpus as to her liberation were regarded by the Court against strong presumption to the contrary.) I assume, therefore, for the purposes of this case, that the mother does really desire to regain the power of disposition of her child and says she has a right thereto. This alleged right she urges, in substance, on two grounds, first, her desire that the child

(1) [1891] A. C. 399, 400.

(2) (1810) 13 East, 195.

should be brought up in her own religious faith, and, secondly, her desire for custody or access to it.

I propose to consider the question of religion first. This Court is not concerned with the respective merits of religions when considering the welfare of a child, but is concerned with the possible invasion of natural law (unless expressly authorized by statute) involved in bringing up a child in a religion different from that of its parent.

In considering the principles of law which have here to be applied it is well first to examine the case of a child born in wedlock. Serjeant Sullivan has drawn our attention to s. 4 of the Custody of Children Act, 1891, which speaks of the Court having "power to make such order as it may think fit to secure that the child be brought up in the religion in which the parent has a legal right to require that the child should be brought up." As regards the father it was long a settled rule that, except under special circumstances, a child should be brought up in his father's religion: see *In re Agar-Ellis* (1); *Talbot* v. *Shrewsbury* (2); *In re Hunt* (3); *Austin* v. *Austin* (4); *In re Newbery* (5); *Hawksworth* v. *Hawksworth.* (6) It has even been said that a father could not bind himself conclusively by contract to exercise, in all events in a particular way, rights as to religion which the law gave him for the benefit of his children and not for his own: *Andrews* v. *Salt.* (7) This parental right is recognized in the Poor Law Act, 1930 (20 Geo. 5, c. 17): see s. 14, sub-s. 2; s. 52, sub-ss. 1, 2 and 5; s. 72, sub-s. 3; s. 73, sub-ss. 1 and 2; and s. 74.

The parent, it has been said, is guardian by nature and nurture. A view taken both by the Court of Chancery and Courts of Common Law: see as to the former, *Ex parte Hopkins* (8); *Stileman* v. *Ashdown* (9); *De Manneville* v. *De Manneville* (10); *In re Marquis of Salisbury* (11); as to the

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(1) 10 Ch. D. 49.
(2) (1840) 4 My. & Cr. 672.
(3) (1843) 2 Con. & L. 373.
(4) (1865) 34 Beav. 257.
(5) (1866) L. R. 1 Ch. 263.
(6) (1871) L. R. 6 Ch. 539.
(7) (1873) L. R. 8 Ch. 622, 636.
(8) (1732) 3 P. Wms. 151.
(9) (1742) 2 Atk. 477, 480.
(10) (1804) 10 Ves. 52, 62.
(11) (1876) 2 Ch. D. 29, 31.

latter, *Ex parte Skinner* (1); *Rex* v. *De Manneville* (2); *In re Hakewill* (3); *Rex* v. *Greenhill* (4); *Reg.* v. *Clarke. In re Race* (5); *Reg.* v. *Howes* (6); *Cartlidge* v. *Cartlidge.* (7)

This doctrine of guardianship by nature and nurture would appear to be based upon the doctrine of natural justice as derived from antiquity: "Un estranger ne p [oe] t justifier le pris d'un enfant per reason de norture." "A stranger may not take possession of a child by reason of nurture": per Danby J., Year Book 8 Edw. 4, p. 7, Mich. pl. 2.

The early Canon Law, with which the equitable view was closely associated, exhibits the same view. Infans infidelium, licite baptizatur, si parentes, id est pater, mater, avus, avia, vel tutores, consentiant: Codex Juris Canonici, Can. 750 paraphrased.

The Summa Theologica reveals the same mediæval attitude with regard to the rights, both as to religion and custody, of parents over their children, thus: as to custody—"It is against natural justice if a child before coming to the use of reason were to be taken away from its parents' custody, or anything done to it against its parents' wish." "A son before coming to the use of reason is under his father's care" (Part II. (second part), Question 10, Article 12): as to religion—"Contra justitiam naturalem esset, si pueri *invitis parentibus* baptizarentur": Summa Theologica, 3, Question 68, Article 10.

The statutes 11 & 12 Will. 3, c. 4, s. 7, and 1 Anne, c. 30, which penalized Catholics and Jewish parents respectively who refused to allow their children to be brought up as Protestants, have long since been repealed. The Courts will now only deprive a father of the custody of his child on the ground of religious opinion, when those opinions manifest themselves in conduct which the law regards as vicious and immoral: *Shelley* v. *Westbrooke* (8); *In re Besant.* (9)

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(1) (1824) 9 Moore, 278.

(2) (1804) 5 East, 221.

(3) (1852) 12 C. B. 223.

(4) (1836) 4 A. & E. 624.

(5) (1857) 7 El. & Bl. 186.

(6) (1860) 3 El. & El. 332.

(7) (1862) 2 Sw. & Tr. 567.

(8) (1821) Jac. 266.

(9) (1879) 11 Ch. D. 508.

As regards the married mother, under statute 12 Car. 2, c. 24, if the father appointed testamentary guardians the mother had no right to interfere with them. Before that time a father could not appoint a guardian, and the right of a widow to the custody of her daughter was secured by statute: see 4 & 5 Ph. & M. c. 8, s. 4. By s. 2 of the Guardianship of Infants Act, 1886, the mother must be guardian either alone or jointly with others appointed by the father, but this was held not to affect the obligation of guardians after the father's death to see that the child was brought up in the father's religion; religio sequitur patrem: *In re Scanlan* (1), approved by the Court of Appeal in *In re McGrath* (2); *In re Grey* (3); *F.* v. *F.* (4) If the mother were sole guardian she had a legal right to the custody of her child: *Reg.* v. *Clarke. In re Race.* (5)

This rule is now modified in any proceedings before the Court in consequence of the Guardianship of Infants Act, 1925, which was cited in the Divisional Court. Sect. 1 of that Act has the effect in proceedings before any Court concerning the custody or upbringing of an infant, that the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody or upbringing, is superior to that of the mother, or the claim of the mother is superior to that of the father. So that, to-day, as between father and mother, the Court may decide on the basis of the welfare of the infant which religious education it shall be given. This statute, however, in my view, has confined itself to questions as between the rights of father and mother which I have already outlined—problems which cannot arise in the case of an illegitimate child, and when we consider the whole history of the matter as I have endeavoured to do, it is difficult to see how that Act can affect the principles laid down in *Barnardo* v. *McHugh* (6),

(1) (1888) 40 Ch. D. 200.
(2) [1893] 1 Ch. 143, 148.
(3) [1902] 2 Ir. R. 684.
(4) [1902] 1 Ch. 688.
(5) 7 El. & Bl. 186.
(6) [1891] A. C. 388.

or how it can be said from a consideration of that statute that there has been a development of thought between 1891 and 1926, as was stated by the Lord Chief Justice in the Divisional Court. I apply the same observation to the Custody of Children Act, 1891, to which the Lord Chief Justice refers in support of his opinion. (See also, in support of this view that the essential law is unchanged, *In re Kerrigan* (1); *Green* v. *Green.* (2)) In *In re Thain* Sargant L.J. in terms said (3): "Sect. 1 of the Guardianship of Infants Act, 1925, does not affect what was and is the law."

These considerations as to the rights of the married father and mother are of great assistance when, as here, the special case of the illegitimate child falls to be determined. In the eye of the law such a child is filius nullius and has no legal guardians: *R.* v. *Felton.* (4) The mother's legal rights as to custody are not entirely the same as those of the father of a legitimate child: *Barnardo* v. *McHugh* (5); *Rex* v. *Walker.* (6) Yet nevertheless, while the child is under the age of nurture the mother has a right to its possession; generally in such a case the Court will prefer the mother to the putative father if there be conflicting claims: *Ex parte Knee.* (7) Though the mother of an illegitimate child is thus not a legal guardian, her claim upon the child has always been recognized in equity. The mother has a natural right to its religious education and custody which will be regarded by the Court: *Reg.* v. *Nash.* (8) (See Blackstone's Commentaries, vol. i., pp. 453, 458.) She has by law obligations imposed upon her in respect of the child: *Barnardo* v. *McHugh* (5); a contract between her and another person for the transfer to that person of her rights and liabilities is invalid: *Humphrys* v. *Polak.* (9)

In the case of *Rex* v. *New* (10) Collins M.R. said (11): "It was said that the religious education which the child would receive at this institution was objectionable. But that was

(1) (1901) 39 Sc. L. R. 8.
(2) [1929] P. 101.
(3) [1926] Ch. 676, 691.
(4) (1758) 1 Bott. P.L.C. (Const) 478.
(5) [1891] A. C. 388.
(6) (1912) 28 Times L. R. 342.
(7) (1804) 1 B. & P. (N. R.) 148.
(8) 10 Q. B. D. 454.
(9) [1901] 2 K. B. 385.
(10) 20 Times L. R. 583.
(11) 20 Times L. R. 584.

a question on which the mother had the right to decide." It would appear, therefore, that so far as religious education is in question, the authorities require the Court to give the gravest considerations to the wishes of the parents—in the case of an illegitimate child, of the mother. In *Reg.* v. *Bolton Union and Stallard* (1) Cave J. said: "The mother has forfeited her parental rights, but she has not forfeited the right of having her child brought up in the religion she desires." Whether the Legislature in applying the declaratory phrase "legal right" to the religious claims of the parent in s. 4 of the Custody of Children Act, 1891, has added anything to the effect of the authorities I doubt. But, in any event, there would appear to be an almost unbroken legal presumption through the ages that the mother of an illegitimate child is prima facie entitled to have her child educated in her own faith, apart altogether from questions of custody—a right which she specifically claims in her affidavits in this case. The creed of an illegitimate child is to be deemed to be that of the mother: *In re White.* (2)

Secondly, as regards custody; in the present case we are told by both parties that the machinery provided by s. 4 of the Custody of Children Act, 1891, will not avail, that is to say, that neither party is willing that the adopter should retain the custody of the child and that the child should be brought up in the Catholic faith. Custody therefore and choice of religion cannot here be treated separately. Though custody in the strict sense is not claimed by the mother, accessibility—a kind of constructive custody—is claimed here. There is no reason to suppose that if the child remains with the adopters the mother will regain custody in this limited sense. Although the child may not find adopters through the Catholic society, the very fact that the Adoption Act will not be used will preserve the legal rights of the mother over her child wherever that child may be, and the evidence is that the Catholic society, will allow the mother reasonable access to her child.

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(1) (1892) 36 Sol. J. (Newspaper), 255.
(2) (1893) 9 Times L. R. 575.

Bearing in mind the dictum of Lord Herschell in *Barnardo* v. *McHugh* (1), which I have quoted, it appears to me that the burden is upon the Protestant society to show that at any rate it would be detrimental to the interests of the child that it should be delivered to the custody of the mother or any person in whose custody she desires it to be.

The degree of what constitutes detriment in this connection has been considered in several cases. Lord Esher M.R. in *Reg.* v. *Gyngall* (2) quotes Knight Bruce V.-C. in *In re Fynn* (3) to the following effect: "Before this jurisdiction can be called into action . . . . it" (i.e., the Court) "must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shewn himself to be a person of such a description, or is *placed in such a position,* as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost, or suspended—should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong." Lord Esher continues: "That is a clear statement that the Court must exercise this jurisdiction with great care, and can only act when it is shewn that either the conduct of the parent, or the description of person he is, or the position in which he is placed, is such as to render it not merely better, but —I will not say 'essential,' but—clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded; but that, where it is so shewn, the Court will exercise its jurisdiction accordingly."

In Lord Esher's view, therefore, the test would appear to be: is it clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded? In *Rex* v. *New* (4) it is thus put by Collins M.R.: "Was there anything in the circumstances of the proposed new disposition of the child by her mother which was so clearly contrary to the benefit of the child as to justify the Court in overriding the wishes of the mother ?" In *In re O'Hara* FitzGibbon L.J. says (1): "In exercising the jurisdiction to control or to ignore the parental right the Court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded."

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(1) [1891] A. C. 388, 398.
(2) [1893] 2 Q. B. 232, 242.
(3) (1848) 2 De G. & S. 457, 474.
(4) 20 Times L. R. 583, 584.

These authorities appear to me to provide a sufficient guidance whereby we can consider the present case. In the first place this child is under two years of age; its own wishes, therefore, cannot be considered. In *Gyngall's* case Lord Esher said (2): "in a short time she will be able to choose for herself. . . . . This child is not a mere infant; if she were only six or seven years old the case would be very different." In the present case the only substantial argument in favour of leaving the child with its adopted parents is that it is better that it should remain in private hands rather than in an institution. These facts existed almost exactly in *Rex* v. *New* (3), and although of course the facts of one case do not bind us in another, yet, in considering Lord Esher's words (4): It is "clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded;" it is material to consider that in 1904—*Gyngall's* case (5) and *O'Hara's* case (6) having been cited to the Court in *New's* case (3)—in a case where the mother desired a certain religious education for the child at an institution, the Court ordered the child to be taken away from a home where it had been adopted and resided for ten years, to be placed in the desired institution. The facts there seem to me stronger in favour of the contentions of the respondents than in the present case. There the child had been for ten years with the adopters and was twelve years of age. If the Court in *New's* case (3) did not consider that this formed a very serious

(1) [1900] 2 I. R. 232, 240.
(2) [1893] 2 Q. B. 232, 243.
(3) 20 Times L. R. 515, 583.
(4) [1893] 2 Q. B. 242.
(5) [1893] 2 Q. B. 232.
(6) [1900] 2 I. R. 232.

and important reason why the parent's rights should be suspended or superseded, it is difficult to see how in the present case such very serious and important considerations arise. Moreover, in *New's* case (1) the child was attending a Church of England day school and a Baptist Sunday School, and it was desired that it should be placed with Anglican Sisters. While I resolutely abstain from expressing any theological views in this case, one cannot but remember that the change in religious education in *New's* case (1)—the child was attending a Church of England day school and was going to an Anglican Sisterhood—was far less than the parent desires in this case.

We were pressed by Sir Thomas Inskip with the Adoption of Children Act, 1926. He said that it might well be that if the Court took no action that on an application under the Adoption of Children Act, 1926, the consent of the mother under s. 2, sub-s. 3, might be given, and that her present view might be changed; but I find it impossible to think, once I have arrived at the view that her present application is bona fide, that at the same time she would be prepared to consent to pass all legal rights in her child to the adopters, a course which would completely stultify all her expressed wishes in this case. Sir Thomas Inskip also called our attention to the proviso to sub-s. 3 of s. 2 of the Adoption of Children Act, which is as follows: "Provided that the Court may dispense with any consent required by this sub-section if satisfied that the person whose consent is to be dispensed with has abandoned or deserted the infant or cannot be found or is incapable of giving such consent or, being a person liable to contribute to the support of the infant, either has persistently neglected or refused to contribute to such support or is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with." It will be seen that the first three elements of this proviso relate to conditions which do not exist in the present case, for (following Lord Hanworth M.R. in *Thain's* case (2), where he discusses s. 3 of the Custody of Children

(1) 20 Times L. R. 515, 583.

(2) [1926] Ch. 676, 688.

Act, 1891, in which substantially similar words occur and on the authority of *O'Hara's* case (1) and others) it is not possible to say here that the mother has persistently neglected or abandoned or deserted the infant: see per FitzGibbon L.J. (2) "The terms 'abandon' and 'desert' when applied to a parent in connexion with his child . . . . imply in ordinary language a disregard of parental duty, and carry with them the idea of moral blame": per Holmes L.J. (3) I think the words "or is a person whose consent ought, in the opinion of the Court and in all the circumstances of the case, to be dispensed with" must be construed as one with the remainder of the proviso, and that such a serious invasion of parental rights—for the dispensation of consent by the Court would mean that the rights and obligations of a parent under s. 5 of the same Act would be taken away and vested in the adopter—cannot reasonably be assumed to be within the competence of the Court in the absence of abandonment or desertion; certainly not on the facts which exist in the present case. It is scarcely necessary to point out that the form of consent which has already been given by the mother with the name of the applicant absent is a nullity. It is clear from s. 2, sub-s. 3, that parental consent can only be given to a specific adoption by a named adopter. I do not think that the remote possibility of an adoption order being made ought to influence the Court in deciding this case.

Sir Thomas Inskip has also argued that the refusal of the issue of the writ is a matter of discretion with which we should not interfere, but in matters of the liberty of the subject I think that the Court should consider this matter de novo, as will one judge of the King's Bench although another has been previously applied to: *Cox* v. *Hakes* (4); but even if we are to regard the previous exercise of discretion, as I have the misfortune to differ from the Lord Chief Justice in an important matter of law on which he based his judgment, I must hold that his opinion, with which the other members

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(1) [1900] 2 I. R. 232.
(2) Ibid. 243.
(3) [1900] 2 I. R. 252.
(4) 15 App. Cas. 506, 514.

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J. M. CARROLL, *In re.*

Slesser L.J.

of the Divisional Court agreed, has taken the matter outside discretion in any event. The opinion to which I refer is this; his Lordship, after citing the passage in Lord Herschell's judgment in *Barnardo* v. *McHugh* (1) to which I have referred; which I believe still to be an accurate presentation of the law which we have to apply, says, in a passage which I have already quoted: "Then in contrast with that passage" (of Lord Herschell) "one must take into consideration not merely some passages in the Custody of Children Act, 1891, but also some passages in the Guardianship of Infants Act, 1925. . . . . There seems to have been between these few years—1891 and 1926—a certain development of thought in this matter." As I have already indicated, I am of opinion first, that as regards the authorities, the cases of *Barnardo* v. *McHugh* (2) and *Gyngall* (3) have as binding an effect as they had when they were delivered and, secondly, that for the reasons I have already given, neither of the statutes cited by the learned judge has modified the considerations of immemorial right of parents by nature and nurture which we have here to regard. I have already expressed my view as to the latter statute of 1925, that it is dealing merely with the respective rights of the father and mother, and I would only add that, if there be any ambiguity in the language, so that we are entitled to look at the preamble; that preamble in terms states: "Whereas Parliament by the Sex Disqualification (Removal) Act, 1919, and various other enactments, has sought to establish equality in law between the sexes, and it is expedient that this principle should obtain with respect to the guardianship of infants and the rights and responsibilities conferred thereby."

As regards the Custody of Children Act, 1891, that Act, as was pointed out by FitzGibbon L.J. in *O'Hara's* case (4), does not affect the jurisdiction formerly exercised by the Court of Chancery, and the surrender of a child to a foster parent being an act of prudence or of necessity under the pressure of present inability to maintain it, is an act done in the interests of the child and cannot be regarded as abandonment or desertion, or even lack of parental duty within the meaning of the Act.

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(1) [1891] A. C. 388, 399.
(2) [1891] A. C. 388.
(3) [1893] 2 Q. B. 232.
(4) [1900] 2 I. R. 232, 243.

Taking into consideration first, that before the passing of "the Judicature Act, a parent was held at common law to have, as against strangers, an absolute right to the custody of his or her child of tender years unless he or she had forfeited it by certain sorts of misconduct"—see per Holmes L.J. in *O'Hara's* case (1)—and further having regard to the Chancery jurisdiction as stated in *Gyngall's* case (2), which since the Judicature Act is now to be exercised in either Division, I think that it is clear that in this case the parent has made out her case to regain the custody of her child and that, consequently, this appeal should be allowed and the writ as craved should issue.

I would only add that if it had been necessary to enforce the writ, the writ would have had to have been amended by adding to it the name of Mr. Beesley or some other responsible officer of the Society. I am unable to find in the books any record of any case where habeas corpus has issued against a corporation eo nomine. Crown Office rule 55, which provides for a writ of mandamus directed to companies and corporations being served on such and so many persons as are competent to do the act required to be done, is silent with regard to habeas corpus.

In principle I see no difficulty in maintaining the writ against the corporation, seeing that a corporation may be liable in an action for false imprisonment: see *Goff* v. *Great Northern Ry. Co.* (3), but difficulties might arise if no persons were served who were competent to obey or who might commit contempt by disobeying the order of the Court: see *Rex* v. *Poplar Borough Council* (*No.* 2). (4)

In the circumstances of the present case, however, as Sir Thomas Inskip has indicated that the Society will act immediately on an intimation of the Court of their view of the legal rights of the mother, this amendment becomes

(1) [1900] 2 I. R. 232, 250.
(2) [1893] 2 Q. B. 232, 239.
(3) (1861) 3 El. & El. 672.
(4) [1922] 1 K. B. 95.

unnecessary, but I wish for the sake of any similar proceedings to place my view on record that the responsible officer ought to have been substituted for the corporation.

I agree with my Lord that this appeal should be allowed with the consequences as to costs stated by him.

Appeal allowed.

Solicitors for appellant: *Ellis & Willes and Ingpen & Armitage.*

Solicitors for respondents: *Carter & Bell.*

R. F. S.

1930
Oct. 17.

CARPENTER *v.* HAYMARKET HOTEL, LIMITED.

Innkeeper—Hotel Proprietor—Liability for Custody of Guest's Goods—Loss of Guest's Diamond Ring—Ring placed by Guest in closed suit case in bedroom and door locked—Alleged Negligence of Guest—Alleged special Contract relieving Innkeeper—Notice that Articles of Value be deposited at Hotel Office—Innkeepers' Liability Act, 1863 (26 *&* 27 *Vict. c.* 41), *ss.* 1, 3.

On October 30, 1929, about 5.30 P.M. the plaintiff and her husband arrived at the defendants' hotel with their suit cases and engaged a room for the night with a view to attending a dance in the neighbourhood. After having tea in their room they dressed for the dance. The plaintiff, having replaced a diamond ring which she was wearing by a pearl ring, put the diamond ring into a jewel-case and placed that in her suit case, which she latched but did not lock. When they went down to dinner the plaintiff's husband locked the door of their room and took the key with him. After dinner they returned to their room, and on leaving it to go to the dance the plaintiff's husband again locked the door and then handed the key in at the hotel office. About 2.30 A.M. the following morning they returned to their room in the hotel, having got the key from the hall porter. On getting up between 8 and 9 A.M. the plaintiff opened her suit case and jewel-case and found that the diamond ring was missing. The defendants were immediately informed of the loss and search was made for the ring, but without result. The defendants had exhibited in the hotel a copy of s. 1 of the Innkeepers' Liability Act, 1863, and in the room occupied by the plaintiff a notice that all articles of value should be deposited at the office. The plaintiff brought an action in the county court against the defendants as insurers for damages for having failed to keep the ring safely. At the trial the above facts were proved or admitted, and it was found as a fact that the plaintiff had taken reasonable care of the ring; but the judge, thinking that he was bound to do so by a previous case, gave judgment for the defendants. On appeal to the Divisional Court:—

Held, that there was evidence to support the finding that the plaintiff had taken reasonable care of the ring and accordingly that the loss of it was not due to negligence on her part; that the fact that she had not deposited the ring at the office in compliance with the notice did not imply that she had retained the protection of it in her own hands to the relief of the defendants; and therefore that she was entitled to judgment against the defendants in the action.

Jones v. *Jackson* (1873) 29 L. T. 399 explained and distinguished.

APPEAL from Westminster County Court.

In this case the plaintiff was Mrs. Minnie Carpenter, the wife of Mr. F. H. Carpenter, a Brighton solicitor, and the defendants were a limited company owning the Haymarket Hotel. On October 30, 1929, between 5.30 and 6 P.M., the plaintiff and her husband, having with them two suit cases and other light luggage, arrived at the hotel, where they booked a bedroom for the night. After having tea in their room they proceeded to dress for a dance. The plaintiff, having replaced a three-stone diamond ring valued at 45*l.* which she was wearing by a pearl ring, put the diamond ring into a small jewel-case, and placed that in her suit case, which she latched but did not lock. At 7.45 P.M. they went down to dinner, the plaintiff's husband locking the door of the room and taking the key with him. After dinner they returned to their room, and on leaving it about 9 P.M. to go to the dance the plaintiff's husband again locked the door, took the key with him, and handed it in at the office on the ground floor. On October 31, about 2.30 or 3 A.M., they returned from the dance and retired to their room, the key of which the plaintiff's husband had got from the hall porter. After getting up between 8 and 9 A.M. the plaintiff opened her suit case and jewel-case, when she found that the diamond ring was missing. The plaintiff made no prolonged search for the ring at the hotel, as her husband had to return to Brighton on business. Before they left the hotel the plaintiff's husband handed to the hotel manager a written statement of the loss of the ring and the circumstances in which it had taken place. Search was immediately made for the ring at the hotel, and the police were informed of its loss, but all efforts to recover it proved

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unavailing. The defendants had caused a copy of s. 1 of the Innkeepers' Liability Act, 1863 (1), to be exhibited in the hotel, and there was also in each of the bedrooms, including that occupied by the plaintiff, a notice that "The company will not be responsible for any property lost in the hotel. Visitors are therefore earnestly requested to lock their doors and leave keys with hall porter, as the management cannot be held responsible for anything lost through visitors not locking their doors. All articles of value should be deposited at the office and a receipt obtained for the same. All instructions as to safe custody of luggage should be given to the hall porter."

In February, 1930, the plaintiff brought the present action against the defendants in the county court, alleging in her particulars of claim that the defendants had failed to keep the ring safely and without loss whilst the plaintiff was staying at the hotel; that whilst she was so staying the ring was wrongfully taken and carried away from the hotel by some person or persons unknown to the plaintiff, and was thereby lost to her; and that she had lost the value of the ring and claimed 30*l.* Her claim was restricted to that sum by the Act of 1863.

The defendants in their defence stated, among other things, that they denied that the ring was taken and carried away, if at all, by reason of any negligence, default, act, or omission of them or their servants; that if the ring was stolen as alleged from the plaintiff at the hotel, her loss arose from her own negligence in failing either to deposit it with the defendants for safe custody or to keep it in a safe place or receptacle; that the plaintiff was accepted as a guest upon the terms of the above mentioned notices that the defendants should be under no liability for any valuables belonging to the plaintiff unless deposited by her with the defendants for safe custody, and that the ring was not deposited with the defendants for safe custody or at all, but was retained by the plaintiff; and that by retaining the ring the plaintiff assumed the care and control thereof to the exclusion of the defendants, thereby relieving the defendants of any liability in respect thereof.

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(1) Innkeepers' Liability Act, 1863:—

Sect. 1: "No innkeeper shall, ... be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of thirty pounds, except in the following cases; (that is to say,)

"(1.) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ:

"(2.) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper: . . . ."

Sect. 3: "Every innkeeper shall cause at least one copy of the first section of this Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn. . . . ."

At the trial evidence was given on behalf of the plaintiff which went to prove the facts above stated.

At the close of the plaintiff's case it was submitted on behalf of the defendants that there was no case for them to answer, because the failure of the plaintiff to comply with the notice exhibited in her room by depositing her ring at the office of the hotel amounted to negligence on her part which caused the loss and exempted the defendants from liability, and the case of *Jones* v. *Jackson* (1) was cited. No evidence was called for the defendants.

The learned county court judge was satisfied that the plaintiff had taken reasonable care of the ring; that the loss was not caused by any wilful act, default, or negligence of the defendants; and that there was a notice under the Act of 1863 and a special notice of which the plaintiff had knowledge; and he held that the case of *Jones* v. *Jackson* (1), as to the effect of such a notice, was binding on him and gave judgment for the defendants, adding that if he was wrong, then there should be judgment for the plaintiff for 30*l.* and costs.

The plaintiff appealed.

Claude Grundy for the plaintiff, appellant. The county court judge was wrong in holding that the defendants were not responsible for the loss of the ring. At common law an innkeeper is an insurer of the safety of the goods of his guest which are brought to the inn, and as such he is liable for the loss of them, except where the loss has been occasioned by the negligence of the guest himself: *Calye's Case* (1) and *Aria* v. *Bridge House Hotel* (*Staines*), *Ld.* (2) In the present case the county court judge was satisfied that the plaintiff had taken reasonable care of the ring; or, in other words, he found as a fact that the loss of the ring had not been brought about by the negligence of the plaintiff. He arrived at that finding on evidence of all the circumstances of the case, including the failure of the plaintiff to comply with the notice by depositing the ring at the office. Having arrived at that finding of fact, he ought as a matter of course to have given judgment for the plaintiff. The learned judge was wrong in supposing that, because the plaintiff had not complied with the notice, he was bound by the case of *Jones* v. *Jackson* (3) to give judgment for the defendants. It was there held that in the special circumstances of that case the fact that the guest had not availed himself of an opportunity which had been given him by the landlord of securing valuables, his conduct amounted to such negligence as prevented him from having recourse against the landlord for their loss. That case is entirely distinguishable from the present case, in which it has been found as a fact that there was no negligence on the part of the plaintiff.

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(1) (1873) 29 L. T. 399.

H. H. Maddocks for the defendants, respondents. The county court judge rightly held that the defendants were not liable. The rule of the common law that an innkeeper is an insurer of the goods of his guest against loss is subject to certain exceptions. It does not extend to the case in which the loss of the goods has been brought about by the negligence of the guest. Here the evidence showed that the loss of the plaintiff's ring was due to her own negligence, and the learned judge misdirected himself when he brought himself to find that the plaintiff had taken reasonable care of the ring.

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(1) (1584) 8 Co. Rep. 32a.

(2) (1927) 137 L. T. 299.

(3) 29 L. T. 399.

Another exception to the rule is to be found in the case where the guest assumes the exclusive charge of his goods; and the guest evinces an intention to assume such charge and to relieve the innkeeper where he disregards a notice or request by the innkeeper to put the goods in a place of special security: *Calye's Case* (1); *Sanders* v. *Spencer* (2); and Halsbury's Laws of England, vol. xvii., p. 320, para. 651. In the present case the proper inference from the fact that the plaintiff disregarded the notice to deposit articles of value at the office of the hotel, and kept the ring in her bedroom, is that she retained it in her own custody and relieved the defendants from liability: *Jones* v. *Jackson* (3); and see *Richmond* v. *Smith*. (4) If the judgment of the learned judge was not right, then judgment ought not to be entered for the plaintiff; but there should be a new trial of the action on the ground that owing to the course which the proceedings took in the county court counsel who appeared there for the defendants had no opportunity of putting the evidence on their behalf before the Court. At the conclusion of the plaintiff's case counsel for the defendants submitted that it could not be maintained in law, and as the judge was of the same opinion it was not necessary that any evidence should be called for the defendants, and none was called. It is desired to call evidence for the defendants with a view to showing that the ring was not lost in the hotel, and they should have an opportunity of calling that evidence.

Grundy in reply. A new trial ought not to be granted. It was open to the defendants' counsel to call evidence at the trial and he did not do so. Even if the proposed evidence were given it could not make any difference to the liability of the defendants.

SWIFT J. This is an appeal from the decision of the learned judge of the Westminster County Court in a case in which the plaintiff claims damages for the loss of a diamond ring which she as a guest had taken to the defendants' hotel. The facts

(1) 8 Co. Rep. 32a.
(2) (1567) 3 Dyer, 266b.
(3) 29 L. T. 399.
(4) (1828) 8 B. & C. 9.

are very simple. [His Lordship stated the facts substantially as above set out, and, after observing that it appeared to be clearly established by the evidence given on behalf of the plaintiff that the ring had been lost in the defendants' hotel, continued as follows:] At the trial in the county court there was not, as of course there could not have been, any dispute as to the liability of an innkeeper for his guest's goods. An innkeeper is at common law an insurer of the goods of the guest which are brought to the inn. He is relieved from the liability attaching to his position as an insurer if the loss of the goods has been occasioned by the negligence of the guest himself. He is also relieved from liability as an insurer if the guest has so conducted himself in relation to the goods as to show that he has released the innkeeper from the duty of affording protection to the goods and has himself undertaken the protection of them.

The only question that appears to have been discussed before the county court judge was whether the plaintiff had herself been guilty of negligence. At the close of the plaintiff's case it was submitted on behalf of the defendants that there was no case for them to answer, the contention being that the failure of the plaintiff to comply with the notice exhibited in her room requesting that all articles of value should be deposited at the office of the hotel by depositing her ring at the office amounted to negligence on her part, that the loss of the ring had been brought about by that negligence of the plaintiff herself, and that therefore the defendants were not responsible. The county court judge came to the conclusion of fact that the plaintiff had not been guilty of any negligence, and I think he was perfectly right in coming to that conclusion of fact. There was certainly no sufficient material to be found in the evidence which was before him to justify him in taking the view that the defendants had proved that the loss of the ring had been brought about by any negligence on the part of the plaintiff herself. I further think that there was in the circumstances of this case no evidence to show that the plaintiff had retained to herself the protection of her property so as to relieve the defendants of liability for its loss. To say that the fact that a guest at an inn leaves some property of value in his bedroom manifests an intention on his part to relieve the innkeeper of his common law liability to insure it against loss is to make an assertion which seems to me to be quite unarguable. Counsel for the defendants candidly admitted that he would not expect that a lady on taking a valuable ring from her finger should go down from her bedroom to the hotel office to deposit it there instead of putting it into her suit case. It seems to me that as regards both these points of exemption from the common law liability of an innkeeper the county court judge was perfectly right in coming to a conclusion of fact in favour of the plaintiff.

Having come to that conclusion of fact, however, the county court judge went on to hold that he was bound to give judgment for the defendants because of the case of *Jones* v. *Jackson* (1), to which his attention had been called. In that case the plaintiff, who was a guest at the defendant's inn, brought an action against the defendant for money which he had lost at the inn, and it was held that the plaintiff's conduct had there amounted to such negligence as prevented him from recovering against the innkeeper. The county court judge failed to appreciate that that case only showed that in the particular circumstances which there existed there was evidence on which a jury might find that the plaintiff himself had been guilty of negligence. The circumstances of the present case might also conceivably have been such as to entitle a jury to find that the plaintiff was negligent, but it has here been found as a fact that she was not negligent. The particular case referred to in no way guides or assists and certainly does not bind another tribunal dealing with somewhat similar facts in another and entirely different case to find that these facts show that there was negligence on the part of the plaintiff. The county court judge here found that the plaintiff had not been guilty of negligence and he did not find that she had retained control of her goods so as to relieve the defendants of their liability.

(1) 29 L. T. 399.

On that finding he should not have given judgment for the defendants, but should have directed that judgment should be entered for the plaintiff for the amount of the damages which she claimed—namely, 30*l.*, with costs.

It is said on behalf of the defendants that even if judgment should not have been given for the defendants, judgment should not be entered for the plaintiff, but at the most a new trial ought to be ordered on the ground that the defendants were prevented from putting their evidence before the county court judge. I have come to the conclusion that there is no force in that contention. What happened in the county court may be gathered from the statements which have been made to this Court by counsel on both sides. Counsel who appeared for the defendants in that Court took the point that the plaintiff had not made out any case for the defendants to answer. The county court judge accepted that submission, and thereupon counsel for the defendants, relying upon the view thus taken by the judge, was content to allow the case to be decided upon the plaintiff's evidence alone. It is said that if the judge had not accepted that submission, counsel for the defendants was prepared to call evidence to show that the ring had not been lost in the hotel. It does not, however, appear that if that evidence had been given it would have entitled the defendants to say that the county court judge was bound to give judgment in their favour. Moreover, I find nothing to make me suppose that the proposed evidence was tendered to the county court judge and that he refused to accept it in such a way as to entitle the defendants to complain now that the evidence was not heard. My view regarding this matter is strengthened by the fact that the county court judge said that if on appeal it should turn out that he was wrong then judgment should be entered for the plaintiff for the amount claimed. When the judge gave that direction it should then have been said, but apparently it was not said, that the defendants desired to give evidence. It seems to have been assumed by everybody that all the evidence had been given and that there was an end of the whole matter. In the circumstances I

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cannot agree to the suggestion that there should be a new trial.

In my opinion the appeal should be allowed, and judgment should be entered for the plaintiff for 30*l.* with costs.

ACTON J. I agree. I think that the county court judge having found the facts, including the fact that the plaintiff had taken reasonable care of the ring, on evidence on which he was entitled to rely, erroneously went against his own finding of fact when he proceeded to hold that he was bound by the case of *Jones* v. *Jackson* (1) to give judgment for the defendants.

As to the other matter that has been discussed—namely, whether the defendants' case was sufficiently heard, I desire to add that the judge's note of the proceedings at the trial seems to make it reasonably clear that the question whether the ring was lost in the hotel was never a substantial issue in the case. The judgment of the learned judge as recorded in the note begins with the statement, to which I have already referred, that he was satisfied that the plaintiff had taken reasonable care of the ring, and goes on to state that the loss was not caused by any wilful act, default or negligence of the defendants. The judgment thus appears to proceed upon the hypothesis that the ring was lost on the hotel premises. It certainly does not appear from the note, by which we must mainly be guided, that there was before the Court any substantial issue whether or not the ring was lost on the premises. The only question which the county court judge was entitled to decide and did decide was that of the liability of the defendants on the assumption that the ring had in fact been lost on the premises.

Appeal allowed.
Judgment for plaintiff.

Solicitors for plaintiff: *Gordon Gardiner, Carpenter & Co.*
Solicitors for defendants: *Rye & Eyre.*

(1) 29 L. T. 399.

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DANIELS AND OTHERS *v.* PINKS.

Gaming—Unlawful Gaming—Common Gaming House—Fruit Machine—Game of Chance—Chances not alike favourable to all the Players—Game played in a Members' Club—Gaming Act, 1845 (8 *&* 9 *Vict. c.* 109), *s.* 2 *—Gaming Houses Act,* 1854 (17 *&* 18 *Vict. c.* 38), *s.* 4.

The committee of management of a members' club installed in the club certain machines for the use of members only and for the purpose of giving additional pleasure to the members. The machines were operated by means of pennies inserted in a slot. The player, having first inserted a penny, depressed a handle, causing three cylinders to revolve on which were depicted bells, bars and fruits. On the cylinders ceasing to revolve the player either lost his penny or received winnings up to twenty pennies, according to the combination of fruits and/or bells and/or bars opposite a pointer. The machine automatically filled a jack pot from its winnings, and the pennies in the jack pot were returned to the player who obtained the combination of three bars. The machines were similar in type to other machines for the user of which persons had been convicted under the Gaming Houses Act, 1854, where the persons had used the machines in shops or places of public entertainment or in proprietary clubs. Four members of the committee of management of the club in question were charged under s. 4 of the Gaming Houses Act, 1854, for being persons having the care and management of certain premises, to wit, the club, which were then being used for the purpose of unlawful gaming being carried on therein. The contention of the members of the committee of management was that the position of a members' club was analogous to that of a private house, and that gaming upon the machines in a members' club was therefore not unlawful gaming:—

Held, that in order that a house should be a common gaming house within s. 2 of the Gaming Act, 1845, it was not necessary that some person should be keeping the house for his gain, lucre or living; it was sufficient that it was a house kept or used for playing at any game where the chances of the game being played therein are not alike favourable to all the players; that the chances of the game played on the machines in this club were not alike favourable to all the players, and that the fact that the club was a members' club did not prevent the club premises being kept or used for the purpose of unlawful gaming being carried on therein, and that therefore the members of the committee of management of the club could be convicted of the offence charged under s. 4 of the Gaming Houses Act, 1854.

Jenks v. *Turpin* (1884) 13 Q. B. D. 505 applied and followed.

CASE stated by the Chairman of the County of London Quarter Sessions.

On April 4, 1930, the appellants, Sydney Daniels, Robert Goddard, George Knott and Peter Hill, appeared before the justices at the County of London Quarter Sessions as appellants against certain convictions at the Greenwich Police Court upon informations laid by the respondent, Edward Pinks, a Sub-Divisional Inspector of Police, for and on behalf of the Commissioner of Police for the Metropolis, which convictions were as follows :—

(1.) For that they on divers days between December 16 and 27, 1929, to wit, December 16, 17, 18 and 27, 1929, at Tanner's Hill, Deptford, within the Metropolitan Police District were persons having the care and management of certain premises, to wit, the Deptford New Town Social Club, which said premises were then being used for the purpose of betting with persons resorting thereto contrary to ss. 1 and 3 of the Betting Act, 1853.

(2.) For that they on divers days between December 15 and 27, 1929, at Deptford, within the Metropolitan Police District, were persons having the care and management of certain premises, to wit, the Deptford New Town Social Club, Tanner's Hill, which said premises were then being used for the purpose of unlawful gaming being carried on therein contrary to s. 4 of the Gaming Houses Act, 1854.

The following facts were either proved or admitted at the hearing of the appeals, which by consent were taken and heard together :—

(*a*) The Deptford New Town Social Club at Tanner's Hill, Deptford, was a "members' club," as distinguished from a "proprietary club," all the property of the club belonging to all the members jointly and being vested in trustees. The club was managed by an elected committee, of which committee all the four appellants were members.

(*b*) On December 11, 1929, there was a meeting of the committee upon the premises of the club, at which meeting the four appellants were present. During the meeting the following resolution was proposed by the appellant Daniels, seconded by the appellant Goddard, and carried : "That fruit machines be again installed in the club for the use of members only, neither affiliated members nor visitors being allowed in the room where the machines are installed."

(*c*) In pursuance of the above resolution two fruit machines were installed in the bar of the club, one machine at each end of the bar counter. The machines, which were installed for the purpose of giving additional pleasure to the members, were operated by means of pennies inserted in a slot. The player, having first inserted a penny, depressed a handle, causing three cylinders to revolve, on which were depicted bells, bars and fruits. On the cylinders ceasing to revolve the player either lost his penny or received winnings up to twenty pennies, according to the combination of fruits and/or bells and/or bars opposite a pointer. The machine automatically filled a jack pot from its winnings, and the pennies in the jack pot were returned to the player who obtained the combination of three bars. The machines were similar in type to other machines for the user of which the Court of Quarter Sessions had convicted persons under the Betting Act, 1853, and the Gaming Houses Act, 1854, where such persons had used such machines in shops or places of public entertainment or in proprietary clubs.

(*d*) On December 16, 17 and 18, 1929, police officers, who were affiliated members of the club, entered the club premises for the purpose of observation, and saw the said fruit machines being used extensively by members of the club. On one occasion one of the police officers was invited by the steward of the club to play upon one of the machines. The officer did so, and lost three pennies.

(*e*) On December 27, 1929, the respondent with other police officers entered the premises of the club and saw play taking place on one of the machines. The appellants, Knott, Daniels and Hill, were present in the club premises at the time. The appellant Daniels said to the respondent: " There was a delegate meeting, and it was discussed then as to having machines in clubs, and I was informed that so long as members only played on the machines, and they were the club's own property, it would be in order. That is why I proposed the machines should be in this club, and also to help the funds of the children's outing."

It was contended for the appellants (1.) that if the use of the machines by the members of the club amounted to betting it was betting inter se, and was to be distinguished from similar betting in a proprietary club, and was therefore not unlawful; and (2.) that the position of a members' club was analogous to that of a private house, and that gaming upon the machines in a members' club was therefore not unlawful gaming. The following cases were referred to: *Attorney-General* v. *Luncheon and Sports Club* (1); *Jenks* v. *Turpin* (2); and *Jackson* v. *Roth.* (3)

It was contended for the respondent that in the case of a members' club the committee of management was responsible for betting and gaming on the said machines in the same way as a proprietor was responsible in the case of a proprietary club.

On the facts stated above the justices came to the conclusion, and so found, that the machines were installed in the club simply for the purpose of giving additional pleasure to the members, and that the premises were not used for the purpose of betting with persons resorting thereto or for the purpose of unlawful gaming. The justices therefore allowed the appeals.

The question of law for the opinion of the High Court was whether upon the facts stated above the justices were right in allowing the appeals.

Cecil Whiteley K.C. and *Vernon Gattie* for the respondent. Having regard to the decision of the House of Lords in *Attorney-General* v. *Luncheon and Sports Club* (1) it is difficult to contend that there ought to have been a conviction on the summons for an offence under s. 1 of the Betting Act, 1853. Lord Dunedin there said (4) that "to induce liability under the statute there must be a bet with a bookmaker." It is difficult to contend here that the members of this club were not betting among themselves. If the summons had been taken out under the second branch of s. 1 of the Betting Act, 1853, it would have been possible to argue that an offence

(1) [1929] A. C. 400.
(2) 13 Q. B. D. 505.
(3) [1919] 1 K. B. 102.
(4) [1929] A. C. 400, 406.

had been committed notwithstanding that what had taken place had been done in a members' club: see *Peers* v. *Caldwell*. (1) The summons was also bad in form, as it did mention the persons by whom the premises were being used for betting.

The appellants, however, ought to have been convicted of the offence charged under s. 4 of the Gaming Houses Act, 1854. It was held in *Jenks* v. *Turpin* (2) that to constitute unlawful gaming it is enough that play is being carried on in a common gaming house; it is not necessary that the games played should be unlawful games. A common gaming house has been defined to be "a house kept or used for playing therein at any game of chance . . . . the chances of which are not alike favourable to all the players": per A. L. Smith J. in *Jenks* v. *Turpin*. (3) This club clearly came within that definition, as the chances of the game played therein on these machines were not alike favourable to all the players. *Rex* v. *Kirby* (4) shows that the use of these machines constituted unlawful gaming. In *Fielding* v. *Turner* (5); *Thompson* v. *Mason* (6); *Roberts* v. *Harrison* (7) it was held that the occupiers of shops, in which automatic machines were placed by means of which those who used the machines won and lost money, were properly convicted of keeping and using the shops for the purpose of unlawful gaming being carried on therein. In *Morris* v. *Godfrey* (8) it was held that whist drives in which progressive whist was played constituted unlawful gaming. There is no distinction as regards this offence between a members' club and a proprietary club, the only difference being that the care and management of a proprietary club is in the hands of the proprietor, while in the case of a members' club the care and management is in the hands of a committee. The reason given by the chairman of Quarter Sessions—namely, that the machines afforded pleasure to the members—would apply equally to members' clubs and to proprietary clubs. The test is whether

(1) [1916] 1 K. B. 371, 379.

(2) 13 Q. B. D. 505.

(3) Ibid. 530.

(4) (1927) 20 Cr. App. R. 12.

(5) [1903] 1 K. B. 867.

(6) (1904) 68 J. P. 270.

(7) (1909) 73 J. P. 439.

(8) (1912) 76 J. P. 297.

the club is kept for the purpose of unlawful gaming being carried on therein. A private house, if kept for the purpose of unlawful gaming being carried on therein, would become a common gaming house.

Rayner Goddard K.C. and *W. B. Frampton* for the appellants. There has never yet been a conviction for gaming against a members' club as distinguished from a proprietary club. Under the Gaming Act, 1845, that distinction is fundamental. The use of these machines is not a game prohibited by statute, but in order to constitute unlawful gaming it is not necessary that the games played shall be unlawful games; it is enough that the play is carried on in a common gaming house: *Jenks* v. *Turpin.* (1) The summons in the present case was under s. 4 of the Gaming Houses Act, 1854, against the persons having the care or management of a house, room or place opened, kept or used for the purpose of unlawful gaming being carried on therein. It is necessary to turn to the Gaming Act, 1845, to find out what is a common gaming house. Sect. 2 of that Act provides "that, in default of other evidence proving any house or place to be a common gaming house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming house, to prove that such house or place is kept or used for playing therein at any unlawful game . . . . or that the chances of any game played therein are not alike favourable to all the players . . . . and every such house or place shall be deemed a common gaming house such as is contrary to law and forbidden to be kept by the said Act of King Henry the Eighth." The statute 33 Hen. 8, c. 9, was passed for the advancement and maintenance of archery and the debarring of unlawful games, and any game of mere skill, such as bowling, coyting, cloysh-cayls, half bowl tennis, or the like, was declared an unlawful game. That portion of the Act which declared any game of mere skill an unlawful game was repealed by s. 1 of the Gaming Act, 1845, so that now a game of skill even though played for money is no longer an unlawful game. It is said in this

(1) 13 Q. B. D. 505.

case that the chances of the game played in this club on these machines were not alike favourable to all the players and that therefore the house is a common gaming house under the statute of Henry 8. But that statute by s. 11 only prohibited persons from keeping or maintaining a house for unlawful games "for his or their gain, lucre or living." Therefore no person can be convicted for keeping a common gaming house if he does not keep it for his "gain, lucre or living." If members of a family sit down in their own house and play a game of chance, the house does not thereby become a common gaming house. The members of a members' club, as distinct from the members of a proprietary club, are in this respect in the same position as the members of a family. If a person made a practice of playing at unlawful games in a private house for the purpose of gain, that house would thereby become a common gaming house. The mere fact, however, that a game of chance is played for money does not make the game unlawful unless it is played in a house kept and used for that purpose. Hawkins J. reviewed the whole legislation on this subject in *Jenks* v. *Turpin.* (1) The legislation was always against those persons who kept houses for their profit in which the various prohibited games were played.

[SWIFT J. Under the Gaming Act, 1845, it is no longer necessary to prove that the person kept the common gaming house for the purpose of "gain, lucre or living."]

There is no statute except 33 Hen. 8, c. 9, which defines what is a common gaming house.

[SWIFT J. The Act of 1845 does not say that the house in which the games are played is a common gaming house within the statute of Henry 8, but that it "shall be deemed a common gaming house such as is contrary to law and forbidden to be kept by the said Act of King Henry 8."]

It was held in *Rex* v. *Rogier* (2) that keeping and maintaining a common gaming house for lucre and gain was an offence indictable at common law. In that case stress was laid on the fact that the house was kept for lucre or gain. If the

(1) 13 Q. B. D. 505, 517.

(2) (1823) 2 D. & R. 431; 1 B. & C. 272.

proprietor of a proprietary club permits unlawful games to be played in the club he may be convicted of keeping a common gaming house, because he is keeping the house for the purposes of gain. But if the members of a members' club use the club for playing games by working a machine, the members of the committee of management cannot be convicted of keeping the house for the purposes of gain, as the members of the club are in the same position as the members of a family. It is admitted that a house may be kept open for a double purpose—namely, as an honest social club, and also for the purpose of gaming, and in such a case the house would be opened and kept for the purpose of gaming : *Jenks* v. *Turpin.* (1) Playing with these machines is unlawful gaming only if it is carried out in a common gaming house. The committee of management of this club cannot be convicted of keeping a common gaming house merely because they bought and installed these machines. The profits arising from playing with these machines belong to the members of the club and not to the committee of management. The finding of the chairman of Quarter Sessions that the committee installed the machines in the club for the pleasure of the members means that it was a casual form of pleasure and that the club was not kept for the purpose of gambling with those machines.

Vernon Gattie replied.

AVORY J. This is a case stated by the chairman of the County of London Sessions which raises a question whether certain persons, named Daniels, Goddard, Knott and Hill, were liable to be convicted under s. 4 of the Gaming Houses Act, 1854, of the offence that they were persons having the care and management of certain premises known as the Deptford New Town Social Club at Tanner's Hill, which premises were then being used for the purpose of unlawful gaming being carried on therein contrary to that section of the statute.

There was also a summons against the same persons alleging that they on divers days had the care and management of these premises, which premises were then being used for the purpose of betting with persons resorting thereto. This summons appears to be bad in form, because premises cannot be used for the purpose of betting with persons resorting thereto; the summons ought to have alleged "for the purpose of some one betting with persons resorting thereto"; but, however, we need not trouble about that, because it has been admitted by Mr. Whiteley that he cannot ask this Court upon the facts of this particular case to say that there ought to have been a conviction under the first branch of s. 1 of the Betting Act, 1853. It must be understood that this Court is expressing no opinion at all upon any similar case in which a charge may be made under the second branch of that section, which prohibits the receipt of money as a consideration for a promise to pay thereafter money on any event relating to a game. That may require consideration in the case of a members' club just as much as in the case of a proprietary club.

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(1) 13 Q. B. D. 505, 512.

For the purposes of our judgment to-day I am content to say that I think in the circumstances which are disclosed in this special case the appellants—Sydney Daniels, Robert Goddard, George Knott and Peter Hill—ought to have been convicted of the offence with which they were charged under the Gaming Houses Act, 1854.

It is necessary to have clearly in one's mind what was necessary to be proved in order to establish that offence. Under s. 4 it was necessary to prove that they were persons who had the care or management of the premises in question, and that those premises were in fact kept or used for the purpose of unlawful gaming being carried on therein. If those two matters were proved then they clearly come within that section.

In order to determine whether the premises were kept or used for unlawful gaming it is necessary to refer back to s. 2 of the Gaming Act, 1845, which enacts: "and whereas doubts have arisen whether certain houses, alleged or reputed to be opened for the use of the subscribers only, or not open to all persons desirous of using the same, are to be deemed common gaming houses; be it declared and enacted, that, in default of other evidence proving any house or place to be a common gaming house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming house, to prove that such house or place is kept or used for playing therein at any unlawful game . . . . or that the chances of any game played therein are not alike favourable to all the players." It is clear that in this case the game that was played was a game where the chances of the game were not alike favourable to all the players, and prima facie therefore as soon as that was established it was sufficient to show that these premises were kept or used for the purpose of that game being played therein, and as soon as that was proved then the house became, or was deemed to be, a common gaming house under s. 2 of the Act of 1845.

But Mr. Rayner Goddard has contended that that is not sufficient; that the concluding words of that section refer back to the statute of Henry 8, and that when the section says, " such house or place shall be deemed a common gaming house such as is contrary to law and forbidden to be kept by the said Act of Henry 8," that means that it is only to be deemed a common gaming house if it complies with the terms of the Act of Henry 8 as a house which some person is keeping for his " gain, lucre or living." I cannot accept that construction of the Act. I think it means that as soon as everything has been proved which is recited in the earlier part of s. 2 of the Act of 1845, then the house is to be deemed a common gaming house just as much as if it complied with the terms of the statute of Henry 8.

On the question whether these premises can be said to have been kept or used for the purpose of unlawful gaming, as soon as it is established that the game that was being played therein was unlawful gaming—as I think is clearly established by the decision in *Jenks* v. *Turpin* (1)—the only remaining question is whether it makes any difference that it was being played in what is called a members' club as distinguished from a proprietary club. Upon that question it is important to observe that Hawkins J. in *Jenks* v. *Turpin* said (2): " When all these facts are looked at even with a most indulgent eye, it is impossible for any man in his senses to doubt that the house was really opened and kept for the purpose of gaming at the game of baccarat as its main and principal object, and not as a mere social club, to which gambling even to a considerable extent was ancillary. I think it right, however, to add, that, if the house had been kept open for a double purpose, viz., as an honest social club for those who did not desire to play, as well as for the purpose of gaming for those who did, it would none the less be a house opened and kept for the 'purpose of gaming.'" And when we find in this case that on December 11, 1929, there was a formal meeting of the committee of management, of which the four appellants were members and at which they were present, and that at that meeting a resolution was proposed, seconded and carried, "that fruit machines be again installed in the club for the use of members only, neither affiliated members nor visitors being allowed in the room where the machines are installed," I cannot doubt that those machines were installed for the purpose of unlawful gaming being carried on by the members of the club; and if in fact these machines were used for that purpose it is clear that the members of the committee who were summoned, and who knew that they were being used for that purpose, must be taken to have intended that they should be used for that purpose, and, therefore, I think they were persons having the care and management of those premises which were then being kept or used for the purpose of unlawful gaming, and, consequently, ought to have been convicted.

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(1) 13 Q. B. D. 505.

(2) 13 Q. B. D. 512.

I think therefore that this appeal should be allowed and the case remitted to quarter sessions for conviction.

SWIFT J. I agree.

ACTON J. I agree.

Appeal allowed.
Case remitted.

Solicitors for respondent: *Wontner & Sons.*
Solicitors for appellants: *Pattinson & Brewer.*

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May 28, 29, 30; June 2, 17 19, 20, 23, 24, 25, 26 27; July 11.

Bailey, Revenue Officer for Stoke-on-Trent Assessment Area v. *Stoke-on-Trent Assessment Committee and Potteries Electric Traction Company, Limited, Occupiers.*

Sedgwick, Revenue Officer for Camberwell Assessment Area v. *Camberwell Assessment Committee and Rating Authority and Watney, Combe, Reid and Company, Limited, Occupiers.*

Revenue Officer for Dudley Assessment Area v. *Lloyds British Testing Company, Limited, Occupiers.*

Bancroft, Revenue Officer for Manchester Assessment Area v. *Manchester Assessment Committee and Union Cold Storage Company, Limited, Occupiers.*

Barton, Revenue Officer for Poplar Assessment Area v. *Union Lighterage Company, Limited, Occupiers.*

Moon, Revenue Officer for Lambeth Assessment Area v. *London County Council.*

Revenue Officer for Wimbledon Assessment Area v. *Surrey Assessment Committee and Kerslake, Occupier.*

Luton Revenue Officer v. *Deeley, Occupier.*

Pickin, Revenue Officer for Langbaurgh v. *Langbaurgh Assessment Committee and Robert Cheyne and Company, Limited, Occupiers.*

Lofthouse, Revenue Officer for Langbaurgh v. *Langbaurgh Assessment Committee and A. Bainbridge, Limited, Occupiers.*

Turpin, Revenue Officer for Middlesbrough v. *Bailey, Occupier.*

Kaye, Revenue Officer for Barnsley v. *Eyre Brothers, Limited, Occupiers.*

Hines, Revenue Officer for Ipswich v. *Eastern Counties Farmers Co-operative Association, Limited, Occupiers.*

Pritchard, Revenue Officer for Cardiff v. *William Lewis and Sons, Occupiers.*

Weatherhead, Revenue Officer for Bradford v. *Bradford Assessment Committee and Laycock, Son and Company, Limited, Occupiers.*

Kaye, Revenue Officer for Dewsbury v. *Dewsbury Assessment Committee and Ernest Burrows, Occupier.*

Barton, Revenue Officer for Stepney v. *R. Twining and Company, Limited, Occupiers.*

Rating—Valuation—Industrial Hereditament—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *ss.* 1, 3.

By s. 1, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, industrial hereditaments are to be distinguished in valuation lists from all other hereditaments contained in those lists. By s. 3, sub-s. 1, "industrial hereditament" means a hereditament occupied and used as (among other things) a factory or workshop, provided that the expression "industrial hereditament" does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or any of them—namely, the purposes of (*a*) a dwelling-house; (*b*) a retail shop; (*c*) distributive wholesale business; (*d*) storage; (*e*) a public supply undertaking, and (*f*) for any other purposes whether or not similar to any of the foregoing, which are not those of a factory or workshop. By sub-s. 2 any place used by the occupier for the housing or maintenance of his road vehicles or as stables, although situate within the precincts of a factory or workshop and used in connection therewith, is not to form part of the factory or workshop, but, save as aforesaid, the expressions "factory" and "workshop" have the same meanings as in the Factory and Workshops Acts, 1901 to 1920.

By s. 149, sub-s. 1, of the Factory and Workshop Act, 1901, the expression "non-textile factory" means (*a*) any works, warehouses, furnaces, etc., named in Part I. of the Sixth Schedule to that Act; (*b*) any premises or places in Part II. of the same Schedule wherein or within the precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there; and

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(*c*) any premises wherein or within the precincts of which any manual labour is exercised by way of trade or for the purposes of gain in or incidental to (i.) the making of any article or of part of any article; or (ii.) the altering, repairing, ornamenting or finishing of any article; or (iii.) the adapting for sale of any article; and wherein or within the precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there. The expression "factory" means textile factory and non-textile factory or either of those descriptions of factories. The expression "workshop" means (*a*) any premises or places named in Part II. of the Sixth Schedule to the Act which are not a factory; and (*b*) any premises, room or place, not being a factory, in which premises, room or place or within the precincts of which premises any manual labour is exercised by way of trade or for purposes of gain in or incidental to (i.) the making of any article or of part of any article; or (ii.) the altering, repairing, ornamenting or finishing of any article; or (iii.) the adapting for sale of any article; and to or over which premises, room or place the employer of the persons working therein has the right of access or control:—

Held, (1.) that to answer the description of an "industrial hereditament" the hereditament (not being a freight transport hereditament and apart from a hereditament occupied and used as a mine or mineral railway) must be a factory or workshop within the meaning of s. 3, sub-s. 1, of the Act of 1928. The hereditament may be a factory or workshop within s. 149, sub-s. 1, of the Factory and Workshop Act, 1901, and therefore a factory or workshop within s. 3, sub-s. 1 (provided it is not excluded by sub-s. 2), of the Act of 1928, whether the product of the manufacturing process carried on there is to be sold in trade exercised within the hereditament or is directly used in carrying on a trade of the occupier elsewhere. The fact that the product of the manufacturing process is only used to enable a trade to be carried on does not prevent the manual labour expended thereon from being exercised by way of trade or for purposes of gain;

Nash v. *Hollinshead* [1901] 1 K. B. 700 explained; *Curtis* v. *Shinner* (1906) 95 L. T. 31 overruled.

"Trade" in this context includes supplying services in return for reward.

(2.) Whether sorting operations can be considered the making of an article, or a manufacturing process so as to constitute the premises where this work is carried on a factory or workshop within s. 149 of the Act of 1901, and therefore an industrial hereditament within s. 3 of the Act of 1928, is a question of degree in each case:

Paterson v. *Hunt* (1909) 101 L. T. 571 considered.

(3.) A hereditament which is in part a factory will be excluded from the class of industrial hereditaments if the primary purpose and use of the hereditament are not those of a factory; otherwise it will be included in that class.

(4.) In determining which is the primary purpose and use the immediate, and not the ulterior, purpose and use are to be considered. It is not enough to exclude a hereditament from the class of industrial

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hereditaments that the product of the hereditament is to be sold or used outside the hereditament for purposes which are not those of a factory or workshop.

APPEALS from decisions of Divisional Courts on seventeen special cases stated, some under s. 11 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), others under s. 40 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), others under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), and all raising questions of the meaning of the words "industrial hereditament" in ss. 1 and 3 of the Rating and Valuation (Apportionment) Act, 1928 (1), popularly known as the Derating Act.

BAILEY (REVENUE OFFICER FOR STOKE-ON-TRENT ASSESSMENT AREA) *v.* POTTERIES ELECTRIC TRACTION COMPANY, LIMITED (OCCUPIERS).

Omnibus Undertaking—Repairs—Manufacture of Spare Parts.

APPEAL from the decision of a Divisional Court upon a case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925.

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(1) Rating and Valuation (Apportionment) Act, 1928, s. 3, sub-s. 1: "In this Act the expression 'industrial hereditament' means a hereditament (not being a freight-transport hereditament) occupied and used as a mine or mineral railway or, subject as hereinafter provided, as a factory or workshop: Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say—(*a*) the purposes of a dwelling-house; (*b*) the purposes of a retail shop; (*c*) the purposes of distributive wholesale business; (*d*) the purposes of storage; (*e*) the purposes of a public supply undertaking; (*f*) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

Sub-s. 2: "For the purposes of this Act any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or workshop, but save as aforesaid, the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920." . . . .

The Revenue Officer objected to the inclusion of the Occupiers' hereditament, described as a tram depot, power station, etc., in the draft Special List as an industrial hereditament, but the Assessment Committee decided that it should remain in the Special List, whereupon the Revenue Officer appealed to Stoke-on-Trent Quarter Sessions, the grounds of appeal being :—

(1.) That the hereditament was not an industrial hereditament within s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, and/or

(2.) That it was not an industrial hereditament within the last mentioned sub-section in that it was primarily occupied and used for one of the following purposes or for a combination of such purposes—namely, the purposes of an omnibus company undertaking and/or the maintenance and/or reconditioning of the Occupiers' omnibuses not by way of trade or for the purposes of gain which were not the purposes of a factory or workshop.

It was proved or admitted that the Occupiers operated a fleet of 198 motor omnibuses, and the hereditament was occupied and used by them—

(*a*) In part as a garage for thirty-six of the motor omnibuses ;

(*b*) for the manufacture of spare parts for the said fleet, and other manufacturing and repair processes distinct from the work of ordinary maintenance (which was carried out on other premises of the Occupiers) in connection with their fleet;

(*c*) the Occupiers also occasionally sold parts manufactured on the said hereditament to other omnibus proprietors, but such sales were negligible.

The hereditament (apart from the said garage and certain other parts which it was not claimed were occupied and used for industrial purposes) comprised an electrical workshop, electrical welding shop, paint shop, large machine shop, blacksmith's shop, gauge, template and tool room, body building and wood-working shop, workshop stores, and armature tinsmiths' and upholstery shop.

The electrical workshop was used for work in connection with telephones, lighting and other electrical work; the electrical welding shop was used for the electrical welding of engineering parts; the paint shop was used for painting omnibuses, lorries and cars, and all new woodwork produced in the body-building and wood-working shop; the large machine shop was equipped with shaping, planing, grinding, drilling, milling, saws, etc. A large variety of spare parts were manufactured in this shop, including destination indicators, cylinder sleeves, radiator tops, water pump spindles, etc. In addition, a number of repair processes, which were additional to ordinary maintenance, were carried out in this shop. The blacksmith's shop was equipped with two twin hearths, a power hammer, a Root's blower and four anvils, and the following parts were manufactured therein: springs, lifeguard and mudwing stays, brake rods, forks, links and levers, body stays, holding down bolts and clips, tyre carrier gear, chassis stays and cross members. The gauge, template and tool room was used for storing special tools, gauges and templates for use in the machine shop. The body-building and wood-working shop was equipped with a planing and surfacing machine, a vertical spindle, a mortising machine, a circular saw and a band saw, and it was used for the rebuilding of omnibus bodies, and the manufacture of parcel trucks, office furniture, time-table boards, lorry bodies, doors and windows for garages, etc., accumulator boxes, wheelbarrows, patterns for castings and seats for omnibuses. The workshop stores were used for the storage of finished and raw materials for making engineering parts. The armature tinsmiths' and upholstery shop was equipped with tools and appliances for work on electrical plant, sheet metal work and upholstering, and the following parts were manufactured therein—namely, electrical coils, cushions, hoods, tyre covers and straps, cab blinds, leather washers, and new steel panels for omnibuses. In addition, a number of repair processes which were additional to ordinary maintenance were carried out in this shop.

The hereditament was registered under the Factory and Workshop Acts, 1901–1920.

The number of persons employed on the said hereditament was as follows :—

Employees in Shop.
Coloured Green and Red respectively on Plan No. 4547 of Stoke Hereditament.

Green.		Red.	
No. on Plan No. 4547.	No. Employed.	No. on Plan No. 4547.	No. Employed.
22	18	23	10
20 and 21	nil	18 and 19	4
7	6	7	nil
1	11	5	14
9	8	4	9
12	2	6	2
	—	3	nil
	45	8	8
	—	9	1
		—	—
		42	48
		—	—

Before July, 1928, the Occupiers operated a tramway undertaking, and used the said hereditament as tramcar sheds and workshops. On November 16 an order was made authorizing the abandonment of the tramways, and the Occupiers thereupon acquired a fleet of motor omnibuses and thereafter utilized the whole of the said hereditament as omnibus workshops. The Occupiers used and occupied the hereditament solely because of its suitability for this purpose, and the use of part thereof as a garage was a temporary expedient only.

If the Occupiers did not themselves manufacture the parts and carry out the processes above referred to, they would have had to purchase parts from, and have the processes carried out by, manufacturers at prices higher than the present cost to the respondents.

The questions for the opinion of the Court were :—

(1.) Whether the hereditament should not be excluded from the Special List on the ground that it was not an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

(2.) Whether on the true construction of s. 3, sub-s. 1 (*f*), of that Act the hereditament should not be excluded from the Special List on the ground that it was primarily occupied and used for the purpose of an omnibus company's undertaking and/or the purposes of the maintenance and/or reconditioning the company's omnibuses not by way of trade or for purposes of gain which were not factory or workshop purposes within the meaning of the section.

(3.) Whether on the true construction of s. 3, sub-s. 1 (*d*), (*e*), and (*f*) of the said Act, the hereditament should not be excluded from the Special List on the ground that it was primarily occupied and used for a combination of the purposes of garaging of vehicles and of other purposes, which were not those of a factory or workshop within the meaning of the section.

(4.) Whether on the true construction of s. 3 of the Act, the hereditament, though occupied and used as a factory or workshop, was not primarily occupied or used for other purposes not being the purposes of a factory or workshop by reason of the fact that the occupation and user of the hereditament was in connection with and/or ancillary to the trade or business of plying for public hire and/or the provision of motor omnibuses for the use of the public, which were not the purposes of a factory or workshop.

(5.) Whether on the true construction of s. 3, sub-s. 2 (*b*), of the Act, and on the facts stated, the hereditament should not be excluded from the Special List as not being an industrial hereditament, but being a place used by the Occupiers for the housing or maintenance of their road vehicles, and therefore deemed not to form part of a factory or workshop within the meaning of the section.

(6.) Whether on the above facts the Recorder came to a correct determination and decision in point of law by dismissing the Revenue Officer's appeal.

The Divisional Court held that the hereditament was not an industrial hereditament within the meaning of the Act, as the manufacture of spare parts therein was for the use of the Occupiers' own business and not for direct gain, and so was not carried on " by way of trade or for purposes of gain." Further, the hereditament was primarily occupied and used for the purpose of the Occupiers' undertaking—namely, the running of omnibus services which were not the purposes of a factory or workshop; any factory or workshop purposes were quite ancillary.

The Occupiers appealed.

Somervell K.C. and *A. H. Forbes* for the appellants. The question is, does a factory cease to be such for the purposes of the Act, because its output is used and absorbed by the owners of the factory instead of being sold on the market. The premises in question are clearly a non-textile factory within s. 149 of the Factory and Workshop Act, 1901, seeing that they fall within para. (*a*) of that section and Part I. of the Sixth Schedule to the Act as a " foundry " or as a " metal works," or, alternatively, within para. (*c*) of the section as premises within which manual labour is exercised by way of trade or for purposes of gain in or incidental to the making or altering of an article or part of the article. *Nash* v. *Hollinshead* (1); *Caledonian Ry. Co.* v. *Paterson* (2); and *Curtis* v. *Shinner* (3) appear to decide that to come within the words " by way of trade or for purposes of gain " the gain must be direct. It is submitted that this is not correct as applied to the Act now under construction, and it should be borne in mind that in the three cases just referred to the class of work which was being considered was clearly outside the plain purpose and intention of the Act. *Mooney* v. *Edinburgh and District Tramways Co.* (4) is in our favour. There, adjacent to, and an adjunct of a shed for the housing of tramcars, was a workshop containing machinery driven by electricity used for the repair of cars. It was held that the shed was a " factory." In the Scottish case under the Derating Act of *Inland Revenue* v. *Paisley Provident*

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(1) [1901] 1 Q. B. 700.
(2) (1898) 1 Fraser (J. C.) 24.
(3) (1906) 95 L. T. 31.
(4) (1901) 4 Fraser, 390.

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Co-operative Society (1) the Court (Lord Sands dissenting) took the view that repair work done in the society's workshop in connection with the society's property and the making of articles for that property was not " by way of trade or for purposes of gain." Those cases were decided on their special facts. Lord Sands took the other view that direct gain was not essential. In *Inland Revenue* v. *Clan Line Steamers* (2) it was held that premises owned and occupied by the shipping company, where parts of ships and their equipment were manufactured and where repairs were executed, about 90 per cent. of the work being done in connection with the company's own ships, were occupied for the purposes of manufacture and repair, which were factory purposes, and were an " industrial hereditament." It was conceded that they were " metal works " ; that concession must equally apply to the present appellants' premises.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the respondent. The object of the Act of 1928 was not to benefit business people generally ; it was intended to relieve manufacturers from rates which bore hardly upon them and so prevented them competing successfully with foreign manufacturers. The appellants are not manufacturers ; they run a fleet of omnibuses, and it would be odd if the result were that, simply because they have a shop where spare parts are made, they should be able to get relief which they would not, but for that fact, obtain.

This shop is not a factory or workshop at all, because it is not occupied or used " by way of trade or for purposes of gain " within s. 149 of the Factory and Workshop Act, 1901 : *Nash* v. *Hollinshead* (3), decided on the similar section, s. 93, sub-s. 1, of the Act of 1878. There a movable steam-engine used to work a mill for grinding meal intended for cattle food on a farm was held not to be a factory. *Curtis* v. *Shinner* (4) is to the same effect. The words " by way of trade or for purposes of gain" mean directly by way of trade and for purposes of direct gain. Accordingly in *Inland*

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(1) 1930 S. C. 497.
(2) 1930 S. C. 445.
(3) [1901] 1 Q. B. 700.
(4) (1906) 95 L. T. 31.

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Revenue v. *Assessor for Perthshire* (1) a saw mill used in adapting timber for use on an estate was held not to be an industrial hereditament because, not being used for purposes of gain, it was not a factory within the Act of 1901. But even if the repair shop in the present case was a factory within the Factory and Workshop Acts, 1901–1920, it does not follow that it is an industrial hereditament within s. 3 of the Derating Act. A hereditament may be occupied and used as a factory or workshop without being occupied and used for the purposes of a factory or workshop. The question is whether the hereditament is primarily occupied and used for what may be called a factory or workshop purpose, meaning one of the purposes indicated in s. 149 of the Factory and Workshop Act, 1901. In the words of Lord Sands in *Paisley Assessor* v. *Inland Revenue* (2): "Premises may qualify for the status of industrial hereditaments in respect that they are, to a certain extent, used for the purposes of a factory or workshop; but they may be disqualified, because that is not the purpose for which they are primarily occupied and used." It was there held that a refuse destructor consisting of furnaces and chimneys belonging to a local authority was not an industrial hereditament, though it was partly used in making bricks by grinding part of the matter to be destroyed. Other cases where hereditaments have been held not to be industrial hereditaments, because they were not primarily occupied and used for factory purposes, are *White Horse Distills* v. *Inland Revenue Officer* (3), a case of a bottle-washing department in a distillery; *Wordie & Co.* v. *Inland Revenue* (4); and *Inland Revenue* v. *Melville, Dundas & Whitson* (5), where a store for pulleys and cranes, and a smithy and shop, merely ancillary to a contractor's business, were excluded from the benefit of the Act. "The intention of the Act was to derate premises which, regarded in their relation to their use and occupation as a whole, are used for the purposes of industrial manufacture, and not to derate premises which, regarded as a whole, are used for the purposes of dealing." Therefore a tailor's shop was held not to be an industrial hereditament: *Inland Revenue* v. *Gunn, Collie and Topping*, per Lord Sands. (1) In the present case the hereditament, assuming it to be a factory, is merely ancillary to the business of running tramways, which is not an industrial purpose, and therefore the hereditament is not an industrial hereditament.

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(1) 1930 S. C. 379.
(2) 1930 S. C. 339, 341.
(3) 1930 S. C. 426.
(4) 1930 S. C. 365.
(5) 1930 S. C. 477.

Somervell K.C. was called upon to reply upon the question whether the hereditament was not used by the appellants for the maintenance of their road vehicles within the meaning of s. 3, sub-s. 2, of the Act.

Solicitor for appellant: *The Treasury Solicitor.*
Solicitors for respondents: *Sydney Morse & Co.*

Cur. adv. vult. (2)

SEDGWICK (REVENUE OFFICER FOR CAMBERWELL ASSESSMENT AREA *v.* ASSESSMENT COMMITTEE FOR THE BOROUGH OF CAMBERWELL, AND THE RATING AUTHORITY OF THE BOROUGH OF CAMBERWELL AND WATNEY, COMBE, REID AND COMPANY, LIMITED (OCCUPIERS).

Carbonating and Bottling Beer.

APPEAL from the decision of a Divisional Court on a Case stated under s. 40 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67).

The Revenue Officer for the Borough of Camberwell objected to the inclusion in a Special List as an industrial hereditament of certain premises situate at 133 Hill Street, Peckham, London, S.E., and hereinafter more particularly described, of which Watney, Combe, Reid & Co., Ld., were and are the Occupiers. The Assessment Committee having heard the objection decided that the said premises should remain in the Special List. The Revenue Officer on August 7, 1929,

(1) 1930 S. C. 389.

(2) For the judgment see post, p. 497.

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gave notice of his intention to appeal against that decision to the General Quarter Sessions of the Peace for the County of London sitting for the purpose of hearing such appeals. The grounds of the appeal were :—

(1.) That the said premises were not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that they were primarily occupied and used for purposes not those of a factory or workshop.

(2.) That the said premises were primarily occupied and used for one or more of the following purposes, that is to say : (*a*) the purposes of distributive wholesale business, and (*b*) the purposes of storage.

Thereupon by consent of the parties and by order of Finlay J. made under s. 40 of the Valuation (Metropolis) Act 1869, the following facts were stated for the opinion of the King's Bench Division on the questions of law arising thereon and hereinafter set out.

8. Percy George Sedgwick is the Revenue Officer for the Borough of Camberwell.

9. The Occupiers, Watney, Combe, Reid & Co., Ld., carry on business as brewers of beer at the Stag Brewery, Pimlico, and at Mortlake and Isleworth, and occupy or own numerous premises known as bottling stores, which premises are of a description more particularly specified in para. 11 hereof, throughout the County of London and its immediate environs. It is conceded by the Occupiers that when selecting sites for business such as is carried on in the premises in question they endeavour to choose places conveniently situated from which to deliver their beer in the respective areas served by the said breweries.

10. The Occupiers are the Occupiers of the hereditament and premises of the aforementioned description known as Beer Bottling Stores at No. 133 Hill Street, Peckham, London, S.E., the subject of the present appeal and Special Case.

11. The said hereditament comprises premises used for the maturing, carbonating and bottling of beer, two dwelling-houses

(occupied by the manager and foreman of the said premises respectively), loading yards, mess rooms, etc., occupying a rectangular island block surrounded by roads and situate about 200 yards from High Street and Rye Lane, Peckham. The frontage to Hill Street is about 85 feet and the frontage to Bells Garden Road at the rear is about 96 feet. There are return frontages to Goldsmith and Frankton Roads, Peckham, of about 196 and 192 feet respectively. The total area is about 17,550 square feet.

12. The said hereditament is occupied and used for the purposes enumerated in paras. 13 to 19 hereof solely in connection with the Occupiers' trade or business of brewers.

13. The bulk of the beer is received from the Pimlico brewery at the said hereditament in tank waggons. The beer in these tank waggons is pumped from thence to carbonating tanks on the first floor, where it is carbonated, and is subsequently filtered in other machines on the same floor. The beer then flows down a pipe to the ground floor, where it is bottled by means of filling machines. On the same floor there is a plant where the empty bottles are washed, and there are also on the same floor several machines, whereby the filled bottles are corked and labelled.

14. After the carbonation, filtering and bottling, and when the bottles have been corked and labelled, the beer is ready for delivery to the trade and is sent out with as little delay as possible; over 20,000 barrels of beer annually are thus dealt with on the said premises.

15. No brewing is carried on in the said hereditament, but the beer when received from the brewery is not such beer as the man in the street expects when he asks for beer, either bottled or draught. After the beer has been dealt with in the manner described in para. 13, it is "bottled beer."

16. Beer is also delivered from the Occupiers' breweries in barrels in a natural matured state, which beer is not dealt with in any way on these premises, except that it is rested and bottled as described in para. 19 hereof. This beer is kept in crates at the said hereditament for an average period of ten days before delivery to customers.

17. The said hereditament is also used as a depot for the storage of empty beer crates, both inwards and outwards.

18. Stout and ale from brewers other than the Occupiers are received in bulk, allowed to mature, and then bottled and delivered from the said premises to the trade. This stout and ale is dealt with as described in para. 19 hereof and this business only forms a small portion of the Occupiers' business at the said premises, being less than 10 per cent.

19. Bottling is a process which needs great skill and judgment. It is necessary in the case of some naturally matured beer to ascertain the exact moment for putting the beer into the bottles. This necessitates keeping the beer under observation for a period, which may vary with each barrel, until it is fit to be bottled. When bottled, all naturally matured beer is kept in bottles at the said hereditament to mature through the process of secondary fermentation over a further period which varies with varying consignments and types, but on the average it is kept from three days to a month before delivery to the trade. During this period it also has to be kept under observation in order to ascertain the exact moment when it is fit to be sent out.

20. The said hereditament is registered under the Factory Acts and is admittedly a factory or workshop within the meaning of those Acts.

21. The number of persons employed on the said hereditament is sixty, of whom thirty-seven are women. The machinery installed therein cost about 5000*l.*

22. Three-fourths of the beer received at the hereditament is carbonated and dealt with as described in para. 13 hereof.

23. The Occupiers have not got room enough at their brewery to enable them there to carbonate, mature, and bottle, as above described all the beer they brew for bottling; but, in so far as space permits, this is done at the brewery to as much as possible of the beer they brew for those purposes.

24. A copy of the Special List so far as it relates to the said hereditament marked A, a copy of the notice of appeal marked B, photographs of the carbonating room and of the

bottling room at the hereditament marked respectively C and D, a plan of the hereditament marked E and a transcript of the shorthand note of the evidence marked F are annexed to and form part of this case.

The questions for the opinion of the Court are : (1.) Whether the hereditament should not be excluded from the Special List on the ground that it is not an industrial hereditament ;

(2.) Whether having regard to s. 3, sub-s. 1 (*c*), of the Rating and Valuation (Apportionment) Act, 1928, the hereditament should not be excluded from the Special List on the ground that it is primarily occupied and used for the purposes of distributive wholesale business ;

(3.) Whether having regard to s. 3, sub-s. 1 (*d*), of the said Act the hereditament should not be excluded from the Special List on the ground that it is primarily occupied and used for the purposes of storage ;

(4.) Whether having regard to s. 3, sub-s. 1 (*c*) and (*d*), of the said Act the hereditament should not be excluded from the Special List on the ground that it is primarily occupied and used for a combination of the purposes of distributive wholesale business and storage.

The parties hereto have agreed that a judgment in conformity with the decision of this Honourable Court with such costs as this Honourable Court may adjudge may be entered on the application of either party hereto at the meeting of the justices in Quarter Sessions of the Peace for the County of London next or next but one after the decision has been given.

B.

To the clerk of the Court for the County of London Quarter Sessions; to the Assessment Committee for the Borough of Camberwell Assessment Area ; to the Rating Authority of the Borough of Camberwell and to Messrs. Watney, Combe, Reid & Co., Ld., or other the Occupier of the hereditament known as Bottling Stores, 133 Hill Street, Peckham, London, S.E.

Take notice that, acting in pursuance of s. 32 of the Valuation (Metropolis) Act, 1869, as applied by s. 1 and para. 7

of the First Schedule to the Rating and Valuation (Apportionment) Act, 1928, I, P. G. Sedgwick, the Revenue Officer who appeared before the Assessment Committee for the above-named Assessment Area on consideration of an objection to the draft Special List for the above-named rating area in relation to the hereditament above-mentioned, being aggrieved by the decision of the said Assessment Committee in relation thereto, intend to appeal against the said decision to the Court of Quarter Sessions for the said County of London And further take notice that the grounds of the said appeal are as follows :

(1.) that the said hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Metropolis) Act, 1928, in that it is primarily occupied and used for purposes not those of a factory or workshop ;

(2.) that the hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the said Act in that it is primarily used for one or more of the following purposes, that is to say :—

(*a*) the purposes of distributive wholesale business ;

(*b*) the purposes of storage.

The Divisional Court (Lord Hewart C.J. and Branson J., Avory J. dissenting), held that the purposes for which the hereditament was primarily occupied and used were those of a distributive wholesale business and not those of a factory, and that the hereditament was therefore not an industrial hereditament, and that it should be removed from the Special List.

The Occupiers appealed.

Wilfrid A. Greene K.C. and *Maurice Healy* for the appellants. The Divisional Court have given undue weight to the fact that the appellants, being obliged to find accommodation outside their brewery, have made facility of distribution one of the matters to be considered in the choice of premises. It does not follow from that that the premises chosen are occupied and used for the purposes of a distributive business, wholesale or retail. The appellants do not only carry on a distributive business within the meaning of s. 3, sub-s. 1 (*c*). They are manufacturers of bottled beer. The greater part of the process of manufacture is no doubt carried on at the brewery, but the facts stated in the case show that the whole process of manufacture is not carried out there, but that a substantial part of the process of manufacture, that of carbonating, maturing, and bottling, is performed at the hereditament in question. The Divisional Court has assumed that the adaption of beer for sale as bottled beer is complete as soon as the carbonating is finished, and that carbonating was so small a part of the business carried on at the hereditament that it might be ignored, and that everything done on the hereditament after carbonating was distributive wholesale business. In *Law* v. *Graham* (1) a case stated by justices on an information for failing to affix an abstract of the Factory and Workshop Acts, 1878 to 1895, at the entrance of the defendants' premises, bottling works which were alleged to be a factory, Lord Alverstone C.J. was of opinion that "where casks of beer are brought in wholsesale and bottles provided, the putting the beer into bottles might, by a somewhat strained construction of the words, be said to be an adapting of the article for sale." The learned Chief Justice would have come to that conclusion with less hesitation if the evidence in para. 19 of this case had been before him. He also expressed the view that the washing of bottles by mechanical means cannot be fairly called a process which is used "in aid of" the bottling of beer. But "bottle washing works" are now among the list of factories and workshops in Part II. of the Sixth Schedule to the Factory and Workshop Act, 1901. In *Fullers, Ld.* v. *Squire* (2) packing sweetmeats in boxes in layers with ornamental papers between them and adorning the boxes with ribbons was held to be adapting the sweetmeats for sale. So in *Hoare* v. *Robert Green, Ld.* (3) making up natural flowers into wreaths, crosses, and bouquets

(1) [1901] 2 K. B. 327.
(2) [1901] 2 K. B. 209.
(3) [1907] 2 K. B. 315.

was held to be adapting for sale. In *James Keith, Ld.* v. *Kirkwood* (1) it was held in Scotland that bottling beer was not adapting it for sale; but there in the case stated by the Sheriff-substitute it was found as a fact that the beer was neither altered nor finished in the process of bottling. The contrary is found in the present case. In *Hoare* v. *Truman, Hanbury, Buxton & Co.* (2) bottling stores, where beer was aerated and bottled, were held to be a factory on the ground that aerating and bottling beer were clearly adapting it for sale. In view of the authorities the Assessment Committee were right in entering the hereditament in a Special List.

Wilfrid Lewis and *Colin H. Pearson* (*Sir William Jowitt A.-G.* with them) for the respondent. The respondent is not concerned to dispute that this hereditament is a factory, and the appellants cannot deny that it is occupied and used for the purposes of distributive wholesale business. The question before the Assessment Committee was whether it is primarily occupied and used for that purpose. That is a question of fact. It is conceded in para. 9 of the Special Case that the appellants chose places conveniently situated for the delivery of their beer when selecting sites for such business as is carried on in this hereditament. The Divisional Court has held by a majority that the principal reason for choosing this hereditament was not because it was particularly suitable for carbonating and bottling their beer or for watching the process of maturing, but because the hereditament was conveniently situated in the line of delivery. The question in this appeal is not really whether the hereditament is primarily used for the purposes of distributive wholesale business, but whether the Divisional Court was wrong in holding that it was so used. There was ample evidence on which they could so hold. The Scottish cases *Inland Revenue* v. *Maclachlans, Ld.* (3); *Inland Revenue* v. *Whitbread & Co.* (4); and *Inland Revenue* v. *William Younger & Co.* (5) have decided that premises from which

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(1) 1914 S. C. (J.) 150.
(2) (1902) 71 L. J. (K. B.) 380.
(3) 1930 S. C. 449.
(4) 1930 S. C. 516.
(5) 1930 S. C. 548.

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beer is dispatched to customers after it has been carbonized and bottled on those premises did not constitute "industrial lands and heritages," but were within the exception in s. 3, sub-s. 1 (*c*), as being occupied and used for the purposes of "distributive wholesale business." A decision of the Court of Session upon a question of law, where the same law applies to Scotland and England alike, will be followed in this Court: *Blake* v. *Midland Ry. Co.* (1)

Maurice Healy in reply. In the Scottish cases cited on behalf of the respondent no evidence was led to prove the importance of carbonating and bottling in the process of manufacturing bottled beer.

Cur. adv. vult. (2)

Solicitors for appellants: *Godden, Holme & Ward.*

Solicitor for respondent: *The Treasury Solicitor.*

REVENUE OFFICER FOR DUDLEY ASSESSMENT AREA *v.* LLOYDS BRITISH TESTING COMPANY LIMITED (OCCUPIERS).

Chain Cables—Testing Works.

APPEAL from the decision of a Divisional Court upon a case stated under the Quarter Sessions Act, 1849.

The Dudley Assessment Committee having decided to include a certain hereditament in the Special List for the rating area of Dudley as an industrial hereditament within the meaning of ss. 1 and 3 of the Rating and Valuation (Apportionment) Act, 1928, the Revenue Officer appealed to the Dudley Quarter Sessions against that decision. The Recorder allowed the appeal, but stated this case for the opinion of the Court.

The Occupiers own and occupy a hereditament situate at Netherton in Dudley, which they occupy and use for the purpose of testing, proving and finishing chains, cables and anchors in accordance with the provisions of the Anchors and Chain Cables Act, 1899 (hereinafter called "the Act of 1899"), and for other purposes.

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(1) (1852) 18 Q. B. 93, 109.

(2) For the judgment see post, p. 513.

The Occupiers claimed the inclusion of the hereditament in the draft Special List for the rating area of Dudley. The Assessment Committee decided that the hereditament should be included in the draft Special List as an industrial hereditament within the meaning of the Act of 1928 with a net annual value of 540*l.* and a rateable value of 135*l.*

From that decision the Revenue Officer appealed, and on the hearing of the appeal the following facts were proved or admitted :—

(1.) The Occupiers were persons to whom the Board of Trade had granted a licence under s. 5 of the Act of 1899, and the work carried out in and upon the hereditament was subject to the supervision of an inspector duly appointed under s. 6 of the said Act.

(2.) Sect. 1 of the Act of 1899 contains penal provisions restricting the sale of chain cables or anchors of the kind specified therein unless the same have been previously proved in accordance with the Act.

(3.) In so far as the Occupiers used and occupied the hereditament under their licence the work carried out therein was prescribed in ss. 7, 8, 9 and 10 of the Second Schedule of the Act of 1899.

With regard to the testing and finishing of chain cables the work involved was as follows : The cables were sent to the Occupiers' works in their manufactured state but unfinished in the respects hereinafter mentioned. In accordance with the provisions of s. 9 of the Act of 1899 a piece of three links was selected and cut out of the length of chain cable. This cutting out was performed by a heavy hydraulic cutter which severed two links one on each side of the piece of three links. The sample piece was then taken to a hydraulic machine and subjected to a test load, called the breaking strain, determined as to load by the provisions of the Second Schedule of the said Act. If the piece selected failed to withstand the breaking strain, a further sample piece was cut out in the aforesaid manner and subjected to the same test. If neither of the samples withstood the breaking strain the whole length was rejected.

If one of the sample pieces satisfactorily withstood the breaking strain the several parts of the cable length were joined together by a welded link formed and welded at a forge on the premises by the Occupiers' employees. The restored cable length was then placed in its entire length in the chain proving machine and subjected to a reduced test load, as provided by the Act, and termed the tensile strain, and this test resulted in appreciable elongation of the cable and a certain change in shape in each link. The cable was then carefully examined link by link by two separate sets of examiners successively who in the course of examination detected any flaws and removed all scale from the links. In the event of any defective links being found on this examination these were cut out and replaced by welded links formed and joined in the manner above described, and the whole length was then retested. When the said tests had been applied in accordance with the Act the Occupiers, as licensed testers, were under obligation to, and did in fact, stamp with a distinctive mark, as laid down in s. 10 of the Act, each cable that had withstood the said strains and was in the opinion of the licensed tester without flaw or material weakness. Thereafter the cable length was drawn into a tank and submerged in hot water. Whilst still hot it was then drawn through a second tank containing an anti-corrosive tar preparation and after that it was ready for despatch to the ultimate consignee. These last two processes were necessary in order to make the cable commercially saleable, and if not carried out at the Occupiers' works would have to be carried out at some other place and either by the manufacturer, purchaser or some other person. With regard to anchors, these were similarly received in their manufactured state from the makers but unfinished in the respects hereinafter mentioned. The anchor was weighed to determine the test load. It was then placed in the anchor testing machine and submitted to the statutory proof strain required. It

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was then taken to pieces for examination of the various parts, and if satisfactory was reassembled. In some types of anchor, the riveting of heated pins inserted by the Occupiers' workmen was necessary in the process of reassembly. When an anchor had passed the test, the obligations and practice of the Occupiers as regards stamping was the same mutatis mutandis as in the case of cables. Before delivery to the consignees anchors were painted by hand.

(4.) It was further the obligation under the Act and practice of the Occupiers, upon request, to deliver a certificate in respect of any cable or anchor which had respectively withstood the said strains and in the opinion of the Occupiers was without flaw or material weakness.

(5.) The hereditament contained heavy machinery and plant both hydraulic and electric for the purpose of carrying out the work above mentioned and also of other work carried out upon the hereditament, which consisted of testing samples of metal, cable, wire rope and other metal substances for other manufacturers, such tests not being in any way connected with the Act of 1899. In the case of such wire rope the method employed was to test to destruction, i.e., to place strain upon the rope until it broke, and the result of such test was communicated to the manufacturers by means of a written statement or formula showing the result of the test. In the hereditament there was a machine shop installed with power and machinery in which the manufacture and repair of tools and plant used by the Occupiers and the shaping of portions of metal for the above mentioned tests were carried out.

(6.) The supervision of the said tests was undertaken by an engineer of long experience and training known as the Superintendent, who was responsible for the exact application in all cases of the tests laid down by the Act of 1899. That engineer signed the certificates above referred to, and it was in virtue of his opinion that the cables and chains were required to be and were so certified. The said tests had been evolved as a result of technical experience, which was acquired and recorded over a period considerably preceding the Act of 1899, and at the present day were recognized by professional opinion as adequate and proper.

(7.) By reason of the licence granted to the Occupiers and the control exercised over the hereditament by the Board of Trade the hereditament was not registered pursuant to the Factory and Workshop Acts by arrangement between the Board of Trade and the Home Office.

(8.) It was admitted by the Occupiers that far the greater part of the work carried out on the hereditament was work done in pursuance of the provisions of the Act of 1899. The Revenue Officer did not contend that if the hereditament were included in the draft Special List any apportionment should be made under the provisions of the Act of 1928 of the net annual value between parts used for industrial purposes and parts used for non-industrial purposes.

Upon these facts the Recorder held that the hereditament was not an "industrial hereditament" within the meaning of ss. 1 and 3 of the Act of 1928 and he accordingly allowed the appeal.

The Occupiers contended :—

(*a*) that the hereditament was in fact and in law a factory or workshop within the meaning of s. 140 of the Factory and Workshop Act, 1901;

(*b*) that the fact that it was not registered under the Factory and Workshop Acts was irrelevant to the issues in the appeal, or, alternatively, that registration was unnecessary in view of the arrangement by the Board of Trade and Home Office;

(*c*) that the proviso to s. 3, sub-s. 1, of the Act of 1928 had no application to the said hereditament;

(*d*) that consequently the hereditament was an industrial hereditament within the meaning of ss. 1 and 3 of the Act of 1928.

The Revenue Officer contended :—

(*a*) That the hereditament was not an industrial hereditament within the meaning of the Act of 1928;

(*b*) that it was not a factory or workshop within the meaning of the Act of 1928;

(*c*) that upon the true construction of s. 3, sub-s. 1 (*f*), of the Act of 1928 the purposes of a cable and anchor testing establishment were not the purposes of a factory or workshop;

(*d*) that upon the true construction of s. 3, sub-s. 1 (*f*), of the Act of 1928 the hereditament, though a factory or a workshop, was not primarily occupied or used for the purposes of a factory or workshop by reason of the fact that such occupation and user was incidental or ancillary to another purpose which was not the purpose of a factory or workshop—namely, that of a testing establishment.

The question for the opinion of the Court was whether the Recorder was right in law in so deciding.

The Divisional Court (Avory J. dissenting) held that the premises were not entitled to be derated inasmuch as the Occupiers used them not for adapting the cables for sale but for testing them to see whether they had been already adapted for sale.

The Occupiers appealed.

Comyns Carr K.C. and *John Wylie* for the appellants. The Divisional Court was wrong in holding that the premises were not entitled to be derated. Cables sent in by manufacturers to be tested are adapted for sale by the appellants in the hereditament in question. A cable goes out a different cable from what it was when it came in, inasmuch as new links have to be substituted for those taken out. Until that has been done cables cannot lawfully be sold.

Wilfrid Lewis (*Sir William Jowitt A.-G.* and *Colin H. Pearson* with him) for the respondent. The expression "adapting for sale" imports that something has been done to an article which alters it. Here the cable goes out of the appellants' premises as it came in save that one link is inserted in it. The cable remains as it was before; there has been no adapting of it for sale.

John Wylie replied.

Solicitors for appellants: *Field, Roscoe & Co., for Jobson & Marshall, Dudley.*

Solicitor for respondent: *The Treasury Solicitor.*

Cur. adv. vult. (1)

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(1) For the judgments see post, pp. 514, 519.

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Bancroft, R. O. v. Union Cold Storage Co.

BANCROFT (Revenue Officer for Manchester Assessment Area) v. UNION COLD STORAGE COMPANY, LIMITED (Occupiers).

Refrigerating Stores.

Special Case stated under s. 11 of the Quarter Sessions Act, 1849.

On October 10, 1929, the Revenue Officer for Manchester, being aggrieved by the decision of the Manchester Assessment Committee, who put the Occupiers' premises in the Special List as an industrial hereditament, gave notice of appeal to quarter sessions, but thereafter the parties agreed to state this case for the opinion of the Court.

The Occupiers carried on business as proprietors of premises for the refrigeration and cold storage of produce at 60 Miller Street, Manchester. The premises were of substantial and special construction, brick built and fireproof. The various floors were utilised as follows :—

(i.) Sub-basement : Boiler and engine room containing two boilers, two engines and two auxiliary engines, two compressors, two dynamos, two circulating pumps ; also refrigerating chamber No. 1 used for the refrigeration and/or refrigerated storage of bacon and fresh killed meat.

(ii.) Basement : Upper floor of boiler and engine room and refrigerated chamber No. 2 used for the refrigeration and/or refrigerated storage of game and fish.

(iii.) Ground floor : Private and general offices, lavatory, loading way and refrigerating chamber No. 3 used for refrigeration and/or refrigerated storage of meat.

(iv.) First floor : Refrigerating chamber No. 4 used for refrigeration and/or refrigerated storage of various meat carcases and offal. The registration notices as to the premises being a "non-textile factory" were on this floor.

(v.) Second floor : Refrigerating chamber No. 5 used for general refrigeration and/or refrigerated storage : offal, tripe, liver, etc.

(vi.) Third floor : Refrigerating chamber No. 6 used for refrigeration and/or refrigerated storage of mutton, lamb.

beef, butter, etc. On the landing, outside this chamber, there was an electrical band saw for cutting up meat and carcases.

(vii.) Fourth floor: Refrigerating chamber No. 7 used for refrigeration and/or refrigerated storage of butter, liquid eggs and general merchandise.

(viii.) Fifth floor: Refrigerating chamber No. 8, the larger part of which was used for refrigeration and/or refrigerated storage of butter, and a small part, recently partitioned off, for refrigeration and/or refrigerated storage of beef.

(ix.) Sixth floor: Refrigerating chamber No. 9, used for refrigeration and/or refrigerated storage of bacon, fish, etc.

(x.) Seventh floor: Refrigerating chamber No. 10 used for preserving eggs.

(xi.) Eighth floor: Refrigerating chamber No. 11, used for preserving eggs, and a special chamber and electric fan on this floor was set aside for defrosting eggs. Eggs were chilled under close supervision after careful stacking. Constant surveillance and instrument readings were essential, and defrosting was carried out under like careful supervision, each egg being candled and examined before repacking for dispatch.

The walls of the refrigerating chambers were insulated by means of charcoal filled in between an outside and inside layer of timber. The insulation consisted of a wall 13 inches thick, comprising 9 inches charcoal impressed between thicknesses of tongued and grooved boards which were in turn insulated with waterproof paper. The process of refrigeration was carried out by means of the compression of ammonia and the circulation of expanded ammonia in a complicated system of expansion pipes which were distributed throughout the premises. The system was known as a system of " direct expansion." Ammonia was compressed in the engines to a pressure of 150 lbs. to the square inch and forced into condensers which were erected on the summit of the building. In these condensers the ammonia liquefied and thereafter expanded in the pipes causing a loss of heat in the process of expansion. The temperature in each chamber was subject to control. The building contained two hydraulic lifts and was lighted by electricity generated by the company, but Corporation power was used for the electric band saw. No ice was manufactured on the hereditament.

The hereditament was conveniently situated on an island site for the purpose of receiving and despatching the commodities received for refrigeration and/or defrosting and/or refrigerated storage. The net annual value of the hereditament was 752*l.*, which was inserted in the Special List by the Assessment Committee as being wholly industrial.

In the chambers used in connection with meat, the processes carried on consisted of freezing, chilling—an entirely distinct process not involving as in the case of freezing the destruction of any of the tissues of the meat under treatment—defrosting, trimming, cutting and preparation of carcases for sale, and on occasions special treatment of cargoes damaged in transit. A special charge was made for the processes by which produce was treated, and there was a tariff of charges which it was agreed greatly exceeded the charges made by the proprietors of warehouse depositories for the storage of goods committed to their charge.

Approximately 25 to 30 per cent. of the produce received by the occupiers was fresh and required to be refrigerated before export or sale in distant markets, and the remainder, approximately 75 per cent., had been already refrigerated and was kept by the occupiers in that state.

The hereditament was registered as a non-textile factory under the Factory and Workshop Acts.

In connection with the general controlling of the temperatures in the premises an engineer's inspection was held four times in each twenty-four hours, and the engineer making the inspection issued and signed a log which was preserved for future reference.

Meat, eggs, etc., subjected to refrigeration were not permitted to be sold as fresh. Frozen meat, chilled meat, fresh meat, fresh eggs and chilled eggs were recognized (in some instances by statute) as distinct marketable commodities.

The questions for the opinion of the Court were :—

1. Whether the hereditament should not be excluded from

the Special List on the ground that it was not an industrial hereditament.

2. Whether, having regard to s. 3, sub-s. 1 (*d*), of the Act of 1928, the hereditament should not be excluded from the Special List on the ground that it was primarily occupied and used for purposes of storage.

3. Whether having regard to s. 3, sub-s. 1 (*f*), of the Act the hereditament should not be excluded from the Special List on the ground that it was primarily occupied and used for the purposes of a cold store and for other purposes ancillary to the foregoing which were not the purposes of a factory or workshop.

4. Whether having regard to s. 3, sub-ss. 1 (*d*) and (*f*), the hereditament should not be excluded from the Special List on the ground that it was primarily occupied and used for a combination of the purposes of storage, a cold store and purposes ancillary thereto which were not the purposes of a factory or workshop within the meaning of the section.

5. Whether on the true construction of s. 3, sub-s. 1 (*f*), of the Act the purposes of a cold store and/or refrigeration were the purposes of a factory or workshop.

6. Whether upon the facts the hereditament was in law an industrial hereditament within the meaning of the Act of 1928.

The Divisional Court said that cold storage was now so well known that if the Legislature had intended that cold stores should not be rateable it would have put some limitation on the word "storage." The case, in their opinion, fell within the express language of s. 3, sub-s. 1 (*d*), of the Act of 1928, and the premises were not entitled to be derated.

The Occupiers appealed.

Wilfrid A. Greene K.C. and *Granville Sharp* for the appellants. The premises are entitled to be derated, as the primary purpose is for refrigerating meat and other articles of food. That is not storage simpliciter. The premises are a factory with complicated machinery for carrying out a commercial process. The articles in the factory are "adapted for sale"—a phrase which does not necessarily involve any alteration in the physical state of the articles. "Adapting for sale" is a wide expression; it includes the putting an article, with or without changing its nature, into a suitable condition for sale on the market. The word "storage" in the Act is not intended to cover purposes which are factory purposes. "Purposes of storage" are ambiguous words; they may mean placing things in a cupboard and leaving them there, or they may mean, as in this case, a continual mechanical process to preserve and adapt things for the market. The latter is clearly a factory purpose and is distinct from mere storage. In *Milne and Union Cold Storage Co.* v. *Glasgow Assessor* (1) and *Union Cold Storage Co.* v. *Inland Revenue* (2) Lord Sands puts as the test: are the articles dealt with in the premises altered in character? If that is so, we say that the articles dealt with in the premises are changed in character. Arresting the processes of nature necessarily involves a change of character in the particular article. It is not, however, really necessary that we should go as far as that inasmuch as the premises are clearly a factory by reason of the fact that articles are there adapted for sale: see s. 149 of the Factory and Workshop Act, 1901.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the respondent were not called upon.

Solicitor for appellants: *Charles H. Wright.*
Solicitor for respondent: *The Treasury Solicitor.*

Cur. adv. vult. (3)

BARTON (Revenue Officer for Poplar Assessment Area) v. UNION LIGHTERAGE COMPANY, LIMITED (Occupiers).

Barge Yard—Repair Workshop.

This case and the case next following were argued together.

Appeal from the decision of a Divisional Court upon a case stated under s. 40 of the Valuation (Metropolis) Act 1869.

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(1) 1929 S. C. 296.

(2) 1930 S. C. 337.

(3) For the judgment see post, p. 502.

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BARTON, R. O.
v.
UNION LIGHTERAGE CO.

At the County of London Sessions on October 16, 1929, the Revenue Officer appealed against the decision of the Poplar Assessment Committee which included in the Special List as an industrial hereditament the hereditament described as follows :—

Occupiers : The Union Lighterage Company, Ld.

Premises : Barge building and repairing, 25 Stewart Street, Poplar.

Assessment Number : District No. 1, No. 338.

The following facts were admitted or proved :—

(*a*) The hereditament consisted of a riverside wharf comprising various workshops and other buildings containing plant and machinery (both rateable and non-rateable). The wharf covered an area of about 67,456 feet super and contained five slipways for laying barges when under repair.

(*b*) Major and minor repairs of all classes of tugs, barges, and lighters and of their equipment were executed on the hereditament solely on account of the Occupiers' own vessels.

(*c*) There were also made on the hereditament tarpaulins, ships' fenders, pump gear for barges, gratings, ringbolts, ring plates, crutches, oar bolts, chain pennants, towing hooks and barge oars, all for use in, on, and in connection with the Occupiers' own vessels.

(*d*) The Occupiers owned about 500 barges and 10 steam and motor tugs.

(*e*) The Occupiers carried on a lighterage business elsewhere than on the said hereditament, but were not stevedores. They undertook the water carriage of goods, but did not handle the goods in and out of the barges.

(*f*) The hereditament was registered under the Factory and Workshop Acts, 1901–20.

For the Revenue Officer it was contended (*a*) that the hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, and/or (*b*) that it was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of that Act, in that it was primarily occupied and used for the following purposes—the purposes of a lighterage business, which were not the purposes of a factory or workshop.

On the part of the Occupiers it was contended :—

(*a*) that the hereditament was a factory or workshop within the meaning of the Factory and Workshop Acts, 1901–20;

(*b*) that it was occupied and used for the purposes of a factory or workshop and not for any of the purposes or combination of purposes mentioned in the proviso to s. 3, sub-s. 1, of the Act of 1928;

(*c*) that the hereditament was an industrial hereditament within the meaning of the Act of 1928, and was properly inserted in the draft Special List.

The quarter sessions were of opinion :—

(*a*) That the hereditament was occupied and used as a factory and workshop within the meaning of the Factory and Workshop Acts, 1901–20; (*b*) that as a matter of fact it was occupied and used primarily, and, indeed, solely for the purposes of repair and manufacture enumerated in the foregoing paragraphs, and that such purposes were purposes of a factory or workshop; (*c*) that it was immaterial to consider whether the works of repair and manufacture were executed in respect of vessels engaged in a lighterage business carried on elsewhere than on the hereditament either by the Occupiers or by other persons, because, in neither event, could the use and occupation of the hereditament, either according to the natural use of language or according to the true construction of s. 3 of the Act of 1928, be said to be that of a lighterage business except in the sense that the existence of vessels requiring execution of the said works was necessary to the said use and occupation; (*d*) that, accordingly, the hereditament was an industrial hereditament within the meaning of the said Act, and was properly inserted in the Special List.

Quarter sessions accordingly decided in favour of the Occupiers' contentions and dismissed the appeal with costs.

The question for the opinion of the Court was whether upon the above facts there was evidence upon which quarter sessions could reasonably come to their decision in point of law.

The Divisional Court, holding itself bound by its decision in *Bailey* v. *Potteries Electric Traction Co.* (1), decided that the primary purpose of the hereditament was to carry on a lighterage business, or was ancillary to that business, which was not a factory purpose; the Occupiers were therefore not entitled to be derated.

The Occupiers appealed.

MOON (Revenue Officer for Lambeth Assessment Area) *v.* LONDON COUNTY COUNCIL (Occupiers).

Tramway Undertaking—Printing Shop for Tickets.

Appeal from the decision of a Divisional Court upon a special case stated by the London Quarter Sessions under s. 40 of the Valuation (Metropolis) Act, 1869.

The Revenue Officer for Lambeth Assessment Area appealed against the decision of the Assessment Committee to include in the Special List as an industrial hereditament the hereditament described as follows:—

Occupiers: London County Council.

Premises: Offices and printing works, 51 and 53 Effra Road.

Assessment number: District 2. 599/600.

Net annual value: 1000*l.* Apportioned for industrial purposes, 770*l.*; for non-industrial purposes, 230*l.*

The following facts were admitted or proved: (*a*) The hereditament comprised (1.) a printing shop for the printing of tickets and other matter to be used upon the Occupiers' tramway undertaking. Reels of ticket pulp were cut into sections stained and printed, after which the tickets were wired, tied, guillotined and made up into bundles. Fare bills, notices, posters, forms and other matter were also printed therein. A large quantity of valuable machinery, plant, and fixtures were used in connection with the processes; (2.) a conveyor room in part whereof the said tickets after printing

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(1) Ante, p. 388.

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are put into boxes for distribution and in part whereof unsold tickets are checked against returns; (3.) offices used in connection with the works carried on in the hereditament and for the preparation of statistical information, mess rooms, rest rooms, and the like.

(*b*) The hereditament was a factory—namely, a letterpress printing works within the Factory and Workshop Acts, 1901 to 1920, and was registered as such.

(*c*) The hereditament was occupied and used as enumerated above solely in connection with the purposes of the Occupiers in connection with their tramway undertaking and no printing of tickets or other work is carried on for third parties.

For the Revenue Officer it was contended (*a*) that the hereditament was not an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, by reason of the fact that it is primarily occupied and used for the purposes of a public supply undertaking and/or for purposes of or ancillary to a public tramway undertaking which were not the purposes of a factory or workshop; (*b*) that even if the hereditament was a factory or workshop it was not occupied or used as a factory or workshop, because such occupation and/or user was incidental or ancillary to another purpose which was not the purpose of a factory or workshop—namely, that of a public tramway undertaking; (*c*) that upon the facts the hereditament was not in law an industrial hereditament within the meaning of the Act of 1928; (*d*) that on the true construction of s. 3, sub-s. 1 (*f*), of the Act of 1928, the purposes of a tramway undertaking or of the Occupiers were not the purposes of a factory or workshop.

On the part of the Occupiers it was contended (*a*) that the hereditament was an industrial hereditament within the meaning of the Act of 1928; (*b*) that the hereditament was occupied and used as a factory and was not primarily occupied and used for any of the purposes referred to in paras. (*e*) and (*f*) of s. 3, sub-s. 1, of the said Act or for a combination of any such purposes.

Quarter sessions decided in favour of the Occupiers and gave judgment in their favour with costs.

The questions for the opinion of the Court were :—

(1.) Whether on the admitted facts the hereditament should not be excluded from the Special List on the ground that it was not an industrial hereditament within the meaning of the Act of 1928, being primarily occupied and used (*a*) for the purposes of a public supply undertaking ; (*b*) for the purposes of printing tickets for the Occupiers' tramways not for sale to a third party and/or for purposes ancillary to the said tramway undertaking ; (*c*) and/or for the purposes of the Occupiers which were not the purposes of a factory or workshop, within the meaning of the said section and/or for a combination of such purposes.

(2.) Whether upon the above facts quarter sessions came to a correct determination and decision in point of law.

The Divisional Court held that as the primary purpose of the occupation of the hereditament was in connection with the running of the County Council's tramways, and as the factory purpose was only anciliary to that purpose, the Occupiers were not entitled to the benefit of derating.

The Occupiers appealed.

Konstam K.C. and *Michael E. Rowe* for the appellants in both cases. The fact that in the first case only the appellants' own barges are repaired in the hereditament does not deprive it of the quality of an "industrial hereditament." A ship-repairing yard is in terms within the Factory Acts. The primary purpose of the yard is the repair of lighters, and that is sufficient to entitle the appellants to the benefit of derating. In the second case, the primary purpose and use of the hereditament is as a factory. The right to the benefit of derating is given where the purpose for which the hereditament is occupied and used includes the manufacture of something to be used ; it is not limited to the case where something is manufactured for sale.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the respondent. A hereditament may be an

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industrial hereditament within s. 3 of the Rating and Valuation (Apportionment) Act, 1928, if it is a factory or workshop within s. 149 of the Factory and Workshop Act, 1901. There are three groups of factories and workshops included in that Act. The first two groups may for convenience be considered together. They are those contained in Parts I. and II. of the Sixth Schedule. These are factories or workshops, as the case may be, simply by virtue of their inclusion in Parts I. or II. of that Schedule, and the occupier who proves that his hereditament is within one or the other of those Parts has taken a step, though it may be only a step, towards proving that it is an industrial hereditament. They are in a sense automatic factories or workshops.

The third group is quite different. It consists of premises which are not factories or workshops at all, unless certain conditions are fulfilled, one of which is that manual labour is exercised within their precincts " by way of trade or for purposes of gain " in (to put it shortly) making or altering an article, or adapting it for sale. In order to bring one of these hereditaments within the category of a factory, the purpose for which it is occupied and used is all important. The purpose must be a gainful purpose and that means a directly gainful purpose: *Nash* v. *Hollinshead.* (1)

The Union Lighterage Company let their barges on hire for direct purposes of gain, but the repairs which when necessary they execute on their lighters are not done directly for the purposes of gain. And the same principle applies to the printing of tickets by the London County Council, who run their trams directly for the purposes of gain but print tram tickets only indirectly for those purposes.

Konstam K.C. in reply.

Solicitor for Union Lighterage Co.: *E. J. Marsh.*

Solicitor for London County Council: *S. A. R. Preston-Hillary.*

Solicitor for respondent: *The Treasury Solicitor.*

Cur. adv. vult. (2)

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(1) [1901] 1 Q. B. 700.

(2) For the judgment see post, p. 500.

REVENUE OFFICER FOR WIMBLEDON ASSESSMENT AREA *v.* SURREY ASSESSMENT COMMITTEE AND KERSLAKE (OCCUPIER).

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WIMBLEDON R. O.
v.
KERSLAKE.

Bakehouse and Shop.

This Case and the Case next following were argued together.

APPEAL from the decision of a Divisional Court upon a Case stated under s. 11 of the Quarter Sessions Act, 1849.

On June 10, 1929, the Assessment Committee heard an objection by J. C. M. Kerslake, the occupier, to the exclusion of a hereditament, 40 High Street, Wimbledon, of a net annual value of 138*l.*, from the draft Special List under the Rating and Valuation (Apportionment) Act, 1928, the exclusion having been made on the ground that the hereditament was a non-industrial hereditament within the proviso to s. 3, sub-s. 1, of the Act. The Assessment Committee decided that the hereditament should be entered in the Special List and apportioned its user as to 27*l.* industrial and 111*l.* non-industrial. The Revenue Officer having given notice of appeal to Surrey Quarter Sessions, the parties agreed to state the facts in the form of a Special Case for the opinion of the High Court as follows :—

The Occupier carried on the business of a baker and confectioner at 40 High Street, Wimbledon. The hereditament comprised :—

(*a*) A well fitted shop (with 24 feet frontage), offices and two kitchens at the rear and seven dwelling-rooms on the first floor, which were occupied by the manager. The shop was used and occupied for the sale of bread and confectionery by retail. The entrance room to the dwelling accommodation (9 feet 6 inches frontage) communicated with the shop and, when required, was used for the service to customers of afternoon teas ;

(*b*) a yard at the rear (approached through an 8 feet wide side entrance) in which were : (1.) a store with a loft over it ; (2.) a store for sugar, jam, etc., on two floors ; (3.) a bread-cooling room on the ground floor only ; (4.) a bakehouse with two ranges of ovens on the two upper floors; (5.) a confectionery bakehouse with two floors over; and (6.) a stable with one floor over. The confectionery bakehouse and the stable were physically attached to the shop and house, but were without internal communication.

That part of the hereditament which comprised the bakehouse and ovens was physically capable of a separate occupation, subject to access being given from the roadway by a drive in at the side of the shop.

The goods manufactured in the hereditament consisted of bread, small bread, cakes and chocolate. In the bakehouses eight persons were regularly employed. The equipment comprised one dough mixing machine, one cake mixing machine, one loaf divider, four steam pipe ovens, with a capacity of 200 sacks of 280 lbs. of flour per week, and the necessary heating apparatus.

The total turnover in trade of the Occupier amounted in value to 15,300*l.* a year, which, subject as hereinafter mentioned, represented the gross revenue derived from sales of goods manufactured in the hereditament. This revenue was derived from the following sources :—

(*a*) 1860*l.* was taken over the counter of the shop, including 200*l.* in respect of goods not manufactured on the hereditament and a sum for teas supplied as mentioned later;

(*b*) 9940*l.* in respect of sales of goods delivered direct to the premises of private customers in fulfilment of orders given to roundsmen operating from the bakery; and

(*c*) 3500*l.* in respect of sales of goods to hotels, clubs, restaurants and other establishments for resale.

It was impossible to ascertain accurately the net profit attributable to each section of the respondent's trade, but it was not contended by either party that the net profit of each section was necessarily in the same ratio as the proportion of turnover.

The hereditament was conveniently situated in a shopping thoroughfare for the purposes of the Occupier's trade and business. It was registered as a factory under the Factory and Workshop Acts, 1901 to 1920.

The Revenue Officer contended that the hereditament should be excluded from the Special List on the ground that it was not an industrial hereditament, but was primarily occupied and used for the purposes of a retail shop, or for a combination of the purposes of the retail sale of bread, confectionery and general refreshments, as a dwelling-house, as a retail shop, as stabling, and for other purposes ancillary to the foregoing. He also contended that on the true construction of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, the hereditament, though occupied and used as a factory or workshop, was not an " industrial hereditament " within the meaning of s. 3 by reason of the fact that that occupation and user were ancillary to other purposes, which were not the purposes of a factory or workshop—namely, the purposes of a restaurant and tea shop.

The Occupier contended that the hereditament was primarily occupied and used as a factory or workshop and not for any of the purposes, or combination of purposes, mentioned in the proviso to s. 3, sub-s. 1, of the Act, and that it was in fact and in law an industrial hereditament within ss. 1 and 3 of the Act.

REVENUE OFFICER FOR LUTON ASSESSMENT AREA v. DEELEY (OCCUPIER).

Bakehouse and Shop.

APPEAL from the decision of a Divisional Court upon a case stated under s. 11 of the Quarter Sessions Act, 1849, after notice of appeal to Bedford Quarter Sessions.

On July 11, 1929, the Luton Assessment Committee heard an objection by the Occupier to the exclusion of the hereditament occupied as a baker's dwelling-house and shop and bakehouse from the draft Special List as a non-industrial hereditament. The Assessment Committee decided to enter the hereditament in the Special List, whereupon the Revenue Officer gave notice of appeal to Quarter Sessions, the grounds of appeal being :—

(1.) that the hereditament was not an industrial hereditament within s. 3, sub-s. 1, of the Rating and Valuation

(Apportionment) Act, 1928, in that it was primarily occupied and used for purposes not that of a factory or workshop and/or

(2.) that it was not an industrial hereditament within the said section in that it was primarily occupied or used for one of the following purposes or for a combination of such purposes: (*a*) the purposes of a dwelling-house; (*b*) the purposes of a retail shop.

Thereupon the parties to the appeal agreed to this Case to be stated from which it appeared that the Occupier carried on business as a baker and confectioner in the hereditament in question, which comprised a dwelling-house, a shop, a bakehouse and outbuildings in Church Street, Leighton Buzzard, which was a road leading to the shopping district of the town but about a third of a mile therefrom. The shop was a typical baker's shop with counter and window displaying various articles for sale. The bakehouse and outbuildings adjoining formed a typical bakehouse used for the purpose of baking bread and cakes for delivery to customers on the round direct from the bakehouse and for supplying the shop with bread, cakes and pastries. It was conveniently situated at the rear of and communicated with the shop. The dwelling-house comprised five rooms communicating with the shop and bakehouse and included three bedrooms, a small bedroom or box room, living room, parlour, scullery, and usual domestic offices.

The bread, cakes, buns and pastries baked in the bakery (other than those sold in the shop over the counter) were delivered from the hereditament by vans or handcarts direct to the consumer's door in fulfilment of orders given to roundsmen operating from the hereditament. The goods sold retail in the shop included bread, pastries, cakes, buns, flour, and biscuits. Occasionally special orders were received otherwise than over the counter. Of the gross revenue of the respondent's trade for the year ending April 30, 1929, 89 per cent. represented the sales direct to the customer's door, 10·1 per cent. represented cash sales over the counter in the shop. The Occupier stated that it was impossible to ascertain exactly the net profit attributable to each section of his trade. The hereditament was registered under the Factory Acts, 1901 to 1920.

The Revenue Officer contended that the hereditament should be excluded from the Special List on the ground that it was not an industrial hereditament; that having regard to s. 3, sub-s. 1 (*a*), of the Act of 1928 it should be excluded on the ground that it was primarily occupied and used for the purposes of a dwelling-house; that having regard to s. 3, sub-s. 1 (*b*), it should be excluded on the ground that it was primarily occupied for the purposes of a retail shop; that having regard to s. 3, sub-s. 1 (*a*) and (*b*), it should be excluded on the ground that it was primarily occupied and used for a combination of the purposes of a dwelling-house and a retail shop; that on the true construction of s. 3, sub-s. 1 (*f*), the purposes of a baker and pastry cook whose products were dealt with as above stated were not the purposes of a factory or workshop; and that upon the facts the hereditament was not in law an industrial hereditament within the meaning of the Act.

The Occupier contended that the hereditament was primarily occupied and used as a factory or workshop, and not for any of the purposes or combination of purposes mentioned in the proviso to s. 3, sub-s. 1, of the Act; and that it was in fact and law an industrial hereditament within ss. 1 and 3 of the Act.

The question for the opinion of the Court was which contention was correct.

In each of the foregoing cases the Divisional Court allowed the appeal, holding that the primary purpose of the hereditament was that of a retail shop, and accordingly that it was not entitled to be derated.

The Occupiers, Kerslake and Deeley, appealed.

Konstam K.C. and *Michael E. Rowe* for the appellants. Looked at as a whole the premises in each case are an industrial hereditament not primarily occupied and used as a retail shop: see the observations of Lord Sands in *Inland Revenue* v.

Gunn, Collie & Topping (1) and the actual decision in *Inland Revenue* v. *Malcolm* (2), where it was held that bakehouses were "industrial hereditaments" and entitled to the benefit of derating. As Lord Sands said in *Inland Revenue* v. *Wigtownshire Assessor* (*Gillespie's Case*) (3): "The bakehouse is vital. The whole fabric, dwelling-house and retail shop, depends upon the bakehouse, and therefore I am unable to hold that, as in contrast with the baking of bread, either retail sale or residence is primary."

Wilfrid Lewis (*Sir William Jowitt A.-G.* with him) for the respondents. The onus is upon the Occupiers to show that they are entitled to the benefit of derating, and they have not discharged that onus. Where the whole output of a factory—the bakehouses in this case—passes out through a retail shop comprised within the premises, the premises taken as a whole are not an "industrial hereditament" within the meaning of the Act. What is done in the bakehouses is merely ancillary to the shop.

Konstam K.C. replied.

Solicitors for Kerslake: *Neve, Beck & Crane.*
Solicitors for Deeley: *Neve, Beck & Crane.*
Solicitor for respondent: *The Treasury Solicitor.*

Cur. adv. vult. (4)

PICKIN (REVENUE OFFICER FOR THE LANGBAURGH ASSESSMENT AREA) v. THE ASSESSMENT COMMITTEE FOR THE LANGBAURGH ASSESSMENT AREA AND ROBERT CHEYNE AND COMPANY, LIMITED (OCCUPIERS).

Scrap Metal Works.

This case and the case next following were argued together.

1. APPEAL from the decision of a Divisional Court upon a Special Case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925.

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(1) 1930 S. C. 389, 395.
(2) 1930 S. C. 437.
(3) 1930 S. C. 543, 547.
(4) For the judgment see post, p. 509.

2. On July 17, 1929, the Assessment Committee heard and considered an objection by the appellant, the Revenue Officer for the Assessment Area, to the inclusion of a hereditament described as Scrap Yard, Machinery Depot and Metal Breaking Yard, Eston Old Station, South Bank, in the draft Special List as an industrial hereditament.

3. The Assessment Committee having considered the objection decided that the hereditament should remain in the Special List.

4. The Revenue Officer being aggrieved by this decision gave notice of intention to appeal against it to the Quarter Sessions for the North Riding of Yorkshire sitting at Northallerton.

5. The grounds of the appeal were :—

(1.) That the hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928 ;

(2.) That the hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied and used for one of the following purposes, that is to say the purposes of storage, the purposes of distributive wholesale business, the purposes of dealing in scrap metal, which are not the purposes of a factory or workshop.

6. On October 4, 1929, the Committee of Justices to whom were delegated by virtue of s. 32, sub-s. 1, of the Rating and Valuation Act, 1925, the powers and duties of Quarter Sessions for the North Riding with respect to appeals under the said Act sitting at Northallerton heard and considered the appeal and dismissed it.

7. The Revenue Officer being dissatisfied with the decision of the Court as being erroneous in point of law duly applied under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, to have a case stated for the opinion of the King's Bench Division on the question of law hereinafter set out.

8. The following facts were proved or admitted :—

(i.) The said Robert William Pickin is the Revenue Officer for the Langbaurgh Assessment Area.

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(ii.) The Occupiers Robert Cheyne & Co., Ld., are iron and steel machinery merchants, dismantling contractors, and scrap metal dealers. The hereditament is occupied and used by them as follows :—

(*a*) As to an amount not exceeding 10 per cent. of all the metal brought on the premises and not dealt with as in (*c*) below, for sorting and grading metal, separating from it, if necessary, any non-ferrous metal, and selling the same.

(*b*) As to the remaining 90 per cent. of all the metal brought on the premises, for sorting and grading the same, and breaking it up by means of the machinery and plant hereinafter set out and so preparing all varieties of scrap iron and steel and adapting the same for use as raw material by iron and steel manufacturers in their furnaces, foundries, cupolas, forges and rolling mills, and as to non-ferrous metals for use in crucibles.

NOTE.—The word "adapting" in one or other of its forms, wherever hereafter used in this case, means either separating, compressing, grading, or breaking up by the method hereinafter described, or cleaning, or all or any of such kinds of treatment of all varieties of scrap iron and steel for sale as aforesaid and involves no change in the substance of the scrap.

(*c*) As to a relatively small part of the articles bought as scrap for altering, patching up, or reconditioning them for use as finished articles, e.g., old boilers repaired or made into tanks or the like.

(iii.) Save in so far as is necessarily incidental to the uses referred to in the last preceding paragraph the premises are not used for storing scrap metal.

(iv.) The hereditament comprises a large open yard about three-quarters of an acre in extent adjacent to the London and North Eastern Railway Company's main line, and is connected by a siding with the London and North Eastern Railway. The accommodation, machinery, and other means provided for breaking up metal are as follows :—

(*a*) A small office for recording particulars of all work done in the yard for transmission to the Occupiers' offices in Middlesbrough, where the whole of their business of selling is carried on.

(*b*) A workshop used for reconditioning parts and such machines as can, when reconditioned, be sold as machines, although bought as scrap, and for repairing the Occupiers' own plant.

(*c*) A store in which the more valuable non-ferrous metals can be worked on and secured against theft.

(*d*) A paint and oil store ; the oil being for the Occupiers' own machinery hereinafter described, and the paint for use on reconstructed or reconditioned boilers, tanks and the like.

(*e*) A small blacksmith's shop for fettling tools and the like.

(*f*) A five ton steam locomotive travelling crane for unloading the scrap as bought and for loading the adapted scrap when sold. This crane is further used for breaking metal (principally cast iron and steel) by means of steel balls varying in weight from half a ton to two tons.

(*g*) One large double ended electrically driven shearing and punching machine for cutting up iron and steel plates and the like and for riveting.

(*h*) One large single ended electrically driven shearing machine.

(*i*) Three oxy-acetylene plants for cutting up awkward metal, hand tools being used in conjunction with them.

(v.) The hereditament is occupied and used for the purposes enumerated above solely in connection with the Occupiers' trade or business as scrap metal dealers.

(vi.) The hereditament is a factory within the meaning of and is registered under the Factory and Workshop Acts, 1901 to 1920.

(vii.) Half of the raw material of the heavy iron and steel trade in this country consists of iron and steel scrap graded and broken up for use in the furnaces of iron and steel manufacturers, the other half being pig iron smelted from iron ore ; without this treatment the scrap cannot from a practical point of view be remelted and used by manufacturers, and this treatment forms the first process in the manufacture of iron and steel in the same way as does the smelting of iron.

(viii.) A few iron and steel manufacturers have their own plant for adapting ordinary scrap by the above and other processes, but the great majority rely upon firms like the Occupiers for their supplies.

(ix.) Only an insignificant proportion of the scrap purchased by the Occupiers is capable without such adaptation as hereinbefore defined of being used by manufacturers in their furnace boxes, cupolas, forges, and rolling mills.

9. A copy of the Special List so far as it relates to the hereditament marked A, and a copy of the notice of appeal marked B, are annexed to and form part of this case.

10. The Revenue Officer contended that these premises, although a factory, were primarily occupied and used for one or more of the following purposes, namely (*a*) for the purposes of storage; (*b*) for the purposes of wholesale distributing business; (*c*) for purposes of dealing in scrap metal, which are not the purposes of a factory or workshop; that the premises therefore came within the proviso to s. 3 of the Rating and Valuation (Apportionment) Act, 1928, and were not an industrial hereditament within the meaning of that Act and not entitled to be placed in the Special List as such; that no manufacturing process was applied to the scrap metal, and that the operations hereinbefore described were merely such as were incidental and ancillary to the purposes above contended for and were not the purposes for which the premises were primarily occupied within the meaning of the section.

11. The Occupiers contended that mere scrap dealing in the sense of buying and selling can be conducted without using such premises as these, as it is in fact conducted by the respondents from their office in Middlesbrough; that the primary purpose for which the hereditament is occupied and used is the purpose of working on iron scrap such as old railway engines, machinery, dismantled plant, wrecks and so forth, by means of the power machinery referred to and so converting it into scrap in a form in which it can be

used by manufacturers in their furnaces; that the adapting of scrap in this manner to furnace or crucible sizes is as much a manufacturing process as is the smelting of iron from iron ore and casting into pigs; that the premises were used for storage in so far as storage was necessarily incidental to the operations above described, but no further or otherwise; that the purposes for which the premises are primarily occupied and used were no more the purposes of a wholesale distributive business than are the purposes for which any factory is used in which goods are manufactured for wholesale distribution; and that the purposes of dealing in scrap metal as the respondents deal in it are the purposes of a factory or workshop, and that the premises were an industrial hereditament.

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12. Our attention was called to s. 149 of the Factory and Workshop Act, 1901.

13. We were of opinion that the premises were an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, for the following reasons:—

(i.) The premises were admitted to be a factory.

(ii.) The premises were not used for storage save such as is necessarily incidental to the business of breaking up the scrap and adapting it for use in furnace boxes and crucibles.

(*a*) In so far as the same is a question of fact, we found as a fact that the Occupiers occupied and used the premises primarily for the purposes of adapting scrap for sale, using the word "adapting" as hereinbefore defined.

(*b*) In so far as the question is one of inference from the facts hereinbefore set out, or a question of law, we drew the inference, or held, that the Occupiers so occupied and used the premises.

(*c*) The purposes of dealing in scrap in the manner in which the Occupiers dealt in it are in our judgment the purposes of a factory or workshop within the meaning o the said Act.

We accordingly dismissed the appeal with costs.

14. The question for the opinion of the Court is whether upon the facts hereinbefore stated and upon the true construction

of s. 3 of the said Act we were right in so holding and in dismissing the appeal. If the Court should answer the question in the affirmative our judgment or order is to stand; if in the negative, our judgment or order is to be reversed or varied or such other order is to be made as to this Honourable Court shall seem right.

B.

Take notice that, acting in pursuance of s. 31, sub-s. 1, and Part I. of the Fifth Schedule of and to the Rating and Valuation Act, 1925, as applied by s. 1 and paragraph 7 of the First Schedule of and to the Rating and Valuation (Apportionment) Act, 1928, I, Robert William Pickin, the Revenue Officer who appeared before the Assessment Committee for the above mentioned assessment area on consideration of an objection to the draft Special List for the above mentioned rating area in relation to the hereditament above mentioned, being aggrieved by the decision of the said Assessment Committee in relation thereto intend to appeal against the said decision to the Court of Quarter Sessions of the Peace for the said North Riding And further take notice that the grounds of the said appeal are as follows:—

(1.) That the said hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied and used for purposes not those of a factory or workshop.

(2.) That the said hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied and used for one or more of the following purposes, that is to say: (*a*) purposes of storage; (*b*) purposes of distributive wholesale business; (*c*) purposes of dealing in scrap metal, which are not the purposes of a factory or workshop.

The Divisional Court (Avory, Talbot and Finlay JJ.) held that the question whether a hereditament was primarily used for one purpose or another was a question of fact rather than of law and that as a matter of law it could not be said that the finding of the Court of Quarter Sessions was wrong; although the Court inclined to the opposite view.

The Revenue Officer appealed.

Wilfrid Lewis and *Colin H. Pearson* (*Sir William Jowitt A.-G.* with them) for the appellant. This hereditament is not used for any purpose which can be regarded as the purpose of a factory or workshop. Mere sorting of scrap iron or steel is not "adapting for sale": *Paterson* v. *Hunt.* (1) The material on which the Occupiers work is scrap when it enters their premises and scrap when it leaves them.

Montgomery K.C. and *Paley Scott* for the respondents were not called on.

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondents: *Iliffe, Sweet & Co., for J. W. R. Punch & Robson, Middlesbrough.*

Cur. adv. vult. (2)

LOFTHOUSE (REVENUE OFFICER FOR THE LANGBAURGH ASSESSMENT AREA) *v.* ASSESSMENT COMMITTEE FOR THE LANGBAURGH ASSESSMENT AREA AND A. BAINBRIDGE, LIMITED (OCCUPIERS).

1. APPEAL from the decision of a Divisional Court upon a Case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925.

2. On July 17, 1929, the Assessment Committee heard and considered an objection by the Revenue Officer to the inclusion of a hereditament described as Scrap Manufacturing Works, North Yorkshire Iron Works, Thornaby, in the draft Special List as an industrial hereditament.

3. The Assessment Committee having considered the said objection decided that the hereditament should remain in the Special List.

4. The Revenue Officer being aggrieved by the said decision on or about July 30, 1929, gave all proper notices of his intention to appeal against the same to the Court of Quarter

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(1) (1909) 101 L. T. 571.

(2) For the judgment see post, p. 507.

Sessions for the North Riding of Yorkshire sitting at Northallerton.

5. The grounds of the appeal were as follows :—

(1.) That the hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928.

(2.) That the hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied and used for one of the following purposes, or for a combination of those purposes, that is to say, the purposes of storage, the purposes of distributive wholesale business, the purposes of dealing in scrap metal, which are not the purposes of a factory or workshop.

6. On October 4, 1929, we the Committee of Justices to whom have been delegated by virtue of s. 32, sub-s. 1, of the Rating and Valuation Act, 1925, the powers and duties of Quarter Sessions for the North Riding of the County of York, with respect to appeals under the said Act, sitting in the Court of Quarter Sessions for the North Riding of Yorkshire at Northallerton, heard and considered the said appeal which we dismissed ordering the Revenue Officer to pay the costs of the Occupiers.

7. The Revenue Officer is dissatisfied with the decision of the Court as being erroneous in point of law and has made application in writing within the time limited by s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, to have a Case stated for the opinion of this Honourable Court on the question of law arising thereon and hereinafter set out.

Now therefore we state and sign the following Case :—

8. The following facts were proved or admitted :—

(i.) Albert Wilson Lofthouse is the Revenue Officer for the Langbaurgh Assessment Area, which covers the Rating Area of Thornaby.

(ii.) The Occupiers, Messrs. A. Bainbridge, Ld., are Iron and Steel Merchants and Scrap Merchants. The said hereditament is occupied and used by them as to part thereof, namely, an office, the net annual value whereof does not exceed 10 per cent. of the net annual value of the rest of the hereditament in question, for the conduct (inter alia) of iron and steel merchants' business, and no other part of the hereditament is used for that part of the business; and as to the remainder of the said hereditament for their scrap merchants' business, as follows :—

(*a*) For receiving in bulk the various kinds of scrap which they buy, e.g., old iron and steel scrap, metal from dismantled works, old and obsolete plant and machinery, wrecked or obsolete ships and part thereof and the like.

(*b*) For sorting the metals and separating brass, copper and other non-ferrous metals from the iron and steel.

(*c*) For breaking up, by means of the machinery hereinafter specified, the iron and steel and adapting it for use in the furnaces, foundry cupolas, forges and rolling mills of iron and steel manufacturers.

NOTE.—The word "Adapting" in one or other of its forms whenever hereinafter used in this case means either separating or compressing or sorting or grading or breaking up by the method hereinafter described, or cleaning or all or any of such methods of treatment of all varieties of scrap iron and steel for sale as aforesaid and involves no change in the substance of the scrap.

(*d*) For reconditioning for use and sale boilers, girders, and other items which are capable of use without being re-melted.

(*e*) For winning, washing, screening and grading sand and gravel.

(iii.) The user mentioned in paragraph (ii.) (*d*) and (*e*) is very small compared with the user for the purpose of adapting scrap.

(iv.) The hereditament comprises a large yard (about eight acres in extent) with a frontage to the River Tees and is connected by a siding to the London and North Eastern Railway, and the accommodation, machinery, and other means provided for breaking up metal are as follows :—

(*a*) Office, one storey brick and slate referred to in paragraph (ii.) above.

(*b*) Various buildings of wood and tarred felt or corrugated iron, such as lead store, sorting and dismantling sheds, men's messroom, weigh cabin, cycle shed, tool shed, etc.

(*c*) Plant for handling, cutting and breaking and adapting scrap for sale for use in melting furnaces, as follows :—

(1.) Three large steam driven travelling cranes with lifting capacities of five, three and two tons each respectively.

(2.) One stationary steam-driven crane with a lifting capacity of fifteen tons.

(3.) Two ball breaking machines with shear legs and five ton balls, raised by electric winches.

(4.) Armour-plated pit in which metal is blasted by high explosive.

(5.) Oxy-acetylene cutting plant.

(6.) Blacksmith's shop for work in keeping machinery and tools in good order.

(7.) Two large shearing machines for shearing steel plates, angles, channels, and the like into suitable sizes.

(8.) A punching machine.

(9.) A hydraulic press for compressing light scrap into solid blocks.

(10.) About 110 yards of railway siding connected with the London and North Eastern Railway.

Save where driven by steam the above machinery is operated by nine electric motors of 182 h.p. in the aggregate, hired from the company which supplies the power ; 360 tons of coal and over 380,000 cubic feet of oxygen are consumed in a year, and about 8000 tons of scrap is dealt with as above each year.

(*d*) On the river front there is a wharf elevator, washer and screen with winch-house for dealing with gravel and sand obtained from the river.

(*e*) In the open yard large quantities of various materials are stacked, sorted, broken up, and re-moulded for disposal.

(v.) Only scrap which is intended to be dealt with by the machinery above referred to is brought to the yard and such store of material as there is is only such as is necessarily incidental to the adaptation of the metal for sale. Metal sold in the same condition as that in which it has been bought is not brought to the premises at all, but is delivered direct from the Occupiers' vendors to the Occupiers' purchasers.

(vi.) The hereditament is occupied and used for the purposes enumerated in paragraph 8 (ii.) and (iii.), solely in connection with the Occupiers' trade or business as iron and steel merchants and scrap merchants.

(vii.) The hereditament is a factory within the meaning of and is registered under the Factory and Workshop Acts, 1901–1920.

(viii.) The number of persons continuously employed in the work of adaptation of scrap on the hereditament is twenty-five to forty.

(ix.) One-half of the raw material of the heavy iron and steel trade in this country consists of iron and steel scrap graded and broken down for use in the fornaces of iron and steel manufacturers, the other half being pig iron smelted from iron ore. Without this treatment the scrap cannot, from a practical point of view, be re-melted and used by the manufacturers, and this treatment forms the first process in the manufacture of iron and steel in the same way as does the smelting of iron.

(x.) A few iron and steel manufacturers adapt their own scrap by the above methods.

(xi.) One very large manufacturer sends his scrap to the Occupiers to be adapted, paying for the adaptation by invoicing the raw scrap to them at one price and receiving it back at a higher price.

(xii.) A file of orders was proved and is annexed hereto and marked A and forms part of this Case. The orders numbered 1, 2 and 3 show purchases, and those numbered 4 to 10 show sales by the Occupiers. These orders show the difference in character between the goods bought and those sold after adaptation by the Occupiers.

9. At the hearing it was admitted by counsel on behalf of the Occupiers that the occupation and user of the hereditament for the purposes set out in paragraph 8 (ii.) (*d*) and (*e*) of this

Case represented so small a portion of the business carried on that, standing alone, it would not make the hereditament an industrial hereditament; and that the substantial issue was whether the purposes set out in para. 8 (ii.) (*a*) (*b*) and (*c*) were or were not such purposes as made the hereditament in question one that was entitled to remain on the Special List as an industrial hereditament by reason of the occupation and user for such purposes.

10. A copy of the Special List so far as the same relates to the hereditament marked B, and a copy of the notice of appeal marked C are annexed to and form part of this Case.

11. The Revenue Officer contended that the hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it was primarily occupied and used for :—

(*a*) storage purposes;

(*b*) the purposes of a distributive wholesale business;

(*c*) the purposes of dealing in scrap metal; and that those purposes are not and that none of them constitute the purposes of a factory or workshop.

12. The Occupiers contended that the hereditament was an industrial hereditament within the meaning of the said section in that it was occupied and used as a factory and in that it did not come within the proviso to the section, and in particular they contended that it was not primarily occupied and used for any of the purposes contended for by the Revenue Officer, but was primarily occupied and used for the purpose of carrying out the processes of breaking up and adapting scrap for sale for use in furnaces as an equivalent and substitute for pig iron, and that this purpose is one of the purposes of a factory. They further contended that the purposes of dealing in scrap metal as carried out in the hereditament were the purposes of a factory.

13. Our attention was called to s. 149 of the Factory and Workshop Act, 1901.

14. We were of opinion that the hereditament was not primarily occupied or used for purposes of storage, or of a distributive wholesale business, or of dealing—in the sense

of buying and selling only—in scrap metal, or for any purposes which were not those of a factory. We were of opinion that the hereditament was primarily occupied and used for the purpose of adapting (as hereinbefore defined) by machinery ordinary miscellaneous scrap into furnace scrap of different kinds and grades and that those purposes were purposes of a factory. We ignored by consent of the parties the use for grading sand, and reconditioning for sale boilers and other metallic objects. We further were of opinion that the hereditament was rightly placed in the Special List as an industrial hereditament and accordingly we dismissed the appeal with costs.

15. The question for the opinion of the Court is whether on the facts proved and admitted and hereinbefore stated, and on the true construction of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, the hereditament is an industrial hereditament. If the Court should answer the above question in the affirmative our said judgment and order is to stand; if in the negative our said judgment and order is to be reversed or varied or such other order made herein as this Honourable Court shall think fit.

C.

Notice of appeal against decision of Assessment Committee.

To the Clerk of the Peace for the North Riding of Yorkshire.

To the Assessment Committee of the above named Assessment Area.

To the Rating Authority of the above named Rating Area.

To A. Bainbridge, Ld., or other the Occupier of the hereditament known as Scrap Manufacturing Works, North Yorkshire Iron Works, Thornaby.

Take Notice that, acting in pursuance of s. 31, sub-s. 1, of, and Part I. of the Fifth Schedule to, the Rating and Valuation Act, 1925, as applied by s. 1 of and paragraph 7 of the First Schedule to the Rating and Valuation (Apportionment) Act, 1928, I Albert Wilson Lofthouse, the Revenue Officer who appeared before the Assessment Committee for the above

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named Assessment Area on consideration of an objection to the draft Special List for the above named Rating Area in relation to the hereditament above mentioned, being aggrieved by the decision of the said Assessment Committee in relation thereto, intend to appeal against the said decision to the Court of Quarter Sessions of the Peace for the said North Riding And further take notice that the grounds of the said appeal are as follows :—

(1.) That the said hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied and used for purposes not those of a factory or workshop.

(2.) That the said hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied and used for one of the following purposes or for a combination of such purposes, that is to say—the purposes of storage, the purposes of distributive wholesale business, the purposes of dealing in scrap metal, which are not the purposes of a factory or workshop.

The Divisional Court (Avory, Talbot and Finlay JJ.) held that the hereditament was an industrial hereditament and that it was rightly entered in the Special List.

The Revenue Officer appealed.

Wilfrid Lewis and *Colin H. Pearson* (*Sir William Jowitt A.-G.* with them) for the appellant.

Montgomery K.C. and *Paley Scott* were not called on.

The arguments of counsel were substantially the same as those urged in the last case.

Solicitor for appellant : *The Treasury Solicitor.*

Solicitors for respondents : *Iliffe, Sweet & Co., for J. W. R. Punch & Robson, Middlesbrough.*

Cur. adv. vult. (1)

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(1) For the judgment see post, p. 507.

TURPIN (REVENUE OFFICER FOR MIDDLESBROUGH ASSESSMENT AREA) *v.* MIDDLESBROUGH ASSESSMENT COMMITTEE AND BAILEY (OCCUPIER).

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TURPIN,
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BAILEY.

Motor Garage—Repairing Shop—Petrol and Accessories sold.

This case and the case next following were argued together.

APPEAL from the decision of a Divisional Court upon a Case stated by the Recorder of Middlesbrough.

It was admitted or proved that the hereditament, the White House Garage, Ormesby Road, Middlesbrough, had been built and equipped for the purpose of the business of a motor mechanic and general engineer and as a garage. It was a brick built structure with concrete floor, divided into two bays, 80 feet by 25 feet. A small part of one of the bays was set apart as a showroom, but was little used. The rest of the floor space was utilized as follows. Office and car washing place, 25 feet by 23 feet; workshop 25 feet by 34 feet 6 inches, in which were installed two lathes, a drilling machine, charging plant with two transformers, and a 7 h.p. electric motor driving the other machinery by means of electric power supplied by the Corporation of Middlesbrough; two inspection pits; space for cars while standing for repairs, 25 feet by 34 feet 6 inches; space for garaging cars, including incoming and outgoing space, 25 feet by 46 feet. No cars were stocked for sale, and if the occupier sold a car he obtained it from another distributor and shared the commission. During 1929 he sold one car and one motor cycle. He also occasionally had on the premises a second-hand car for sale on commission for a customer, or taken in part payment for a new car. The average number of cars garaged nightly was five at 3*s.* 6*d.* a week, and the occupier had a motor cab which he used for hire purposes. Practically the whole of his time was devoted to repair work, principally on motor cars, but also to some extent on motor boats and agricultural tractors, and he employed two mechanics to assist in the repair work. By far the greater proportion of the repair work was done on cars sent to the premises for the express purpose of being repaired. No person was employed specifically for selling purposes. At the front of the hereditament were windows in which small accessories were exposed for sale, and outside the premises were three petrol pumps for the retail supply of petrol. Sales of such accessories and petrol took place daily. Much of the larger part of the premises was devoted to repair work, which yielded the larger part of the income of the business. The hereditament was registered as a factory under the Factory and Workshop Acts, 1901–1920.

The Assessment Committee included the hereditament in the draft Special List as an industrial hereditament. The Revenue Officer appealed to quarter sessions on the ground that it was not an industrial hereditament in that it was primarily occupied and used for purposes not those of a factory or workshop; and for that it was primarily occupied and used for the purposes of storage and/or for the purposes of a retail shop, and/or for the purposes of a garage which were not the purposes of a factory or workshop.

The Recorder held that the hereditament was an industrial hereditament, stating that he decided the case entirely on its own facts, and did not purport or intend to decide that all garages where repairs and retail selling were done as well as the garaging of cars were industrial hereditaments. He dismissed the appeal. (1)

KAYE (REVENUE OFFICER FOR BARNSLEY) v. EYRE BROTHERS, LIMITED (OCCUPIERS).

Motor Garage—Sale of Petrol and Accessories.

APPEAL from the decision of a Divisional Court on a Case stated by the Quarter Sessions for the West Riding of Yorkshire.

The Occupiers were a limited liability company with a registered office at 6 Eldon Street, Barnsley, and carried on business as motor car builders, motor car repairers, hirers of private cars, dealers in petrol and motor car accessories, and

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(1) For the judgment see post, p. 511.

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garage proprietors, in various premises in Barnsley and (inter alia) were the occupiers of an hereditament known as The Garage, Market Hill, Barnsley. The respondent was the Revenue Officer for the Barnsley Assessment Area. In the draft Special List the hereditament was entered as an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928. The Revenue Officer appealed to Quarter Sessions on the grounds that the hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Act of 1928, in that it was primarily occupied and used for purposes not those of a factory or workshop: and/or that it was not an industrial hereditament within the meaning of that section in that it was primarily occupied and used for one of the following purposes or for a combination of such purposes, that was to say: the purposes of a retail shop, the purposes of a garage and/or retail repairs which were not the purposes of a factory or workshop.

At the hearing the following facts were proved by the Revenue Officer or admitted: (1) The hereditament consisted of a large shed used for the deposit and care of motor cars, some of which were repaired and some garaged for varying periods on the hereditament; and it was also occupied and used for the sale of petrol and motor accessories. (2.) Within the premises were two rooms, one used as an office or store for spare parts and the other as a mess-room for workmen, and adjacent to the entrance were two petrol pumps. (3.) The premises had a door opening on to a private road immediately opposite to the rear of the premises No. 6 Eldon Street, occupied by the respondents as a central office and sales shop for motor accessories, and the directors of the firm and others constantly during business hours used that means of communication between the Market Hill premises and the Eldon Street premises. (4) The Revenue Officer was not in a position to give any evidence or estimate of the relative extent of user of the Market Hill premises for industrial and non-industrial purposes or of the extent to which the premises were ancillary to the premises in Eldon

Street. (5.) The Company had furnished the local Assessment Committee with full particulars of their trade in the respective departments at the hearing on July 29, 1929.

At the close of the Revenue Officer's case it was submitted by counsel for the Company that there was no case for the Company to answer, but Quarter Sessions ruled that there was a case to answer.

It was then proved by the Company or admitted : (1.) That the Market Hill premises occupied a floor space of 590 square yards, of which about 520 square yards were used for the repair of cars and the storage of cars undergoing or awaiting repairs, and about 70 square yards for the storage of spare parts and accessories needed for repairs, a mess-room for the workmen, and the accommodation of two motor-spirit pumps. (2.) That the Market Hill premises had originally accommodated the whole of the Company's undertaking, but that during the last twelve years other premises had been gradually acquired in different parts of the town and the business had been departmentalized. (3.) That the Market Hill premises were the principal repair shop for privately owned motor vehicles in the county borough and that the Company were recognized repairers to the principal motor insurance companies. (4.) That six adult workmen and two boys were continuously employed on motor vehicle repair work on the premises and that the premises were registered as a workshop under the Factory and Workshop Acts. (5.) That during the eleven months ending March 31, 1929, 2278 separate repair jobs, varying in character from simple part repairs to rebuilding of an engine, were carried out on separate individual cars, and during the six months ending August 31, 1929, the number of such jobs amounted to 1032. (6.) That orders for a small proportion of the foregoing jobs were given at the Eldon Street premises. (7.) That the Company's estimate for the user of the Market Hill premises was over 90 per cent. for workshop purposes.

Quarter Sessions held that the hereditament was not an industrial hereditament within the above sub-section in that it was primarily occupied and used as a retail shop within the meaning of the Act and allowed the appeal. The Occupiers appealed to the Divisional Court.

On appeal the Divisional Court (Talbot and Finlay JJ.; Avory J. dissenting) dismissed the appeal by the Revenue Officer in Bailey's case and allowed the appeal by Eyre Brothers, Ld.

The Revenue Officer appealed in each case.

Wilfrid Lewis (*Sir William Jowitt A.-G.* and *Colin H. Pearson* with him) for the appellant.

In the case of *Turpin* v. *Bailey* the premises are a "retail shop" within the meaning of s. 3, sub-s. 1, of the Act of 1928, and, further, the nature of the work done is repair work of a retail character. The physical appearance of the premises supports the view contended for by the Revenue Officer. In the Irish case of *Wallace* v. *Dixon* (1) the yard of a coal merchant where orders only were received was held to be a "shop" within the meaning of the Shops Act, 1912. If such a place could be said to be a "shop" it is obvious that it is not the mere physical appearance of the premises that is the determining factor. Any place is a shop into which the Occupier invites the public to come to do retail business—for example repairs—with him.

[He referred to *Inland Revenue* v. *Gunn, Collie & Topping* (2); *Inland Revenue* v. *Moffat* (3); and *Inland Revenue* v. *W. & T. Avery, Ld.* (4)]

Hedley K.C. and *Paley Scott* for the respondent Bailey. There was evidence before the Recorder which entitled him to find that the primary user of the premises was not that of a retail shop. The Act excludes from the benefit of derating premises where repair work is carried out only where the work done is in premises similar to a shop: see per Lord Sands in *Inland Revenue* v. *W. & T. Avery, Ld.* (4) No one would call the premises in question in this case a retail shop.

Wilfrid Lewis replied.

Cur. adv. vult. (5)

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(1) [1917] 2 I. R. 236.

(2) 1930 S. C. 389.

(3) 1930 S. C. 412.

(4) 1930 S. C. 490.

(5) For the judgment see post, p. 511.

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KAYE, R. O. *v.* EYRE BROTHERS, LD.

In Kaye v. *Eyre Brothers.*

Wilfrid Lewis (*Sir William Jowitt A.-G.* and *Colin H. Pearson* with him) for the appellant. The Occupiers, the respondents in this Court, carried on a retail business at the Market Hill premises. Every member of the public who applied at those premises could be served with petrol. The fact that of late years the principal work carried on there has been the work of repair does not affect the nature of the hereditament or convert a retail shop into an industrial hereditament: *Inland Revenue* v. *Duke of Richmond and Gordon.* (1)

Jardine K.C. and *W. P. Donald* for the respondents were not called upon.

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for Turpin: *Cunliffes, Blake & Mossman, for Meek, Stubbs & Barnley, Middlesbrough.*

Solicitors for Eyre Brothers, Ld.: *Corbin, Greener & Cook, for Smith & Ibberson, Barnsley.*

Cur. adv. vult. (2)

HINES (REVENUE OFFICER FOR THE IPSWICH COUNTY BOROUGH ASSESSMENT AREA) *v.* EASTERN COUNTIES FARMERS' CO-OPERATIVE ASSOCIATION, LIMITED (OCCUPIERS).

APPEAL from the decision of a Divisional Court upon a Special Case stated for the opinion of the Court on questions of law as hereinafter stated, pursuant to the order of Finlay J. dated November 18, 1929, and by consent of the parties under and by virtue of the provisions of s. 11 of the Quarter Sessions Act, 1849.

1. The premises, the subject of this appeal, consist of a single hereditament situate in Hadleigh Road, Ipswich, and described in the Valuation List as a seed warehouse, kiln, office, wool shed, land and siding.

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(1) (1930) Unreported.

(2) For the judgment see post, p. 511.

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HINES, R. O. v. EASTERN FARMERS' CO-OPERATIVE ASSOCIATION.

2. On June 19, 1929, the Revenue Officer and the Occupiers appeared before the Assessment Committee for the Ipswich County Borough Assessment Area, on the hearing of an objection by the Occupiers to the omission of the said hereditament from the draft Special List prepared by the Rating Authority and transmitted to the Assessment Committee pursuant to the provisions of the First Schedule to the Rating and Valuation (Apportionment) Act, 1928.

3. The Assessment Committee having heard and considered the objection determined that the said hereditament was an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, and ordered that it should be included as such in the said draft Special List.

4. The Revenue Officer being aggrieved by the said determination and order of the Assessment Committee duly entered on July 8, 1929, an appeal to the Court of Quarter Sessions for the County Borough of Ipswich, by lodging a notice of appeal with the clerk to the said Court and serving a copy of such notice upon the Occupiers. A copy of the said notice forms part of this case and is annexed hereto and marked A.

5. The Revenue Officer and the Occupiers thereupon consented, and agreed pursuant to s. 11 of the Quarter Sessions Acts, 1849, to state the facts of the case in the form of a Special Case for the opinion of this Honourable Court, and obtained the order hereinbefore referred to from Finlay J. dated November 18, 1929.

6. In pursuance of the said order the parties to the said appeal have concurred in stating for the opinion of this Honourable Court on the questions of law arising thereon and hereinafter set out the following facts :—

8. (*a*) The Occupiers carry on the business of seed merchants at the said premises comprising the aforesaid hereditament. The said premises are a factory and workshop within the meaning of the provisions of the Factory and Workshops Acts, 1901 to 1920. The rateable value is 788*l*.

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(*b*) The hereditament is used and occupied by the Occupiers for the purposes of their trade in seeds. The seed warehouse is a six-floor building specially constructed for seed-cleaning and is of large dimensions. Save as to a very small office it is used exclusively for the purposes of treating and preparing seeds for sale. The office occupies a floor space of 84 square feet, and is used only by the foreman for the purposes of recording the quantity of seed received and despatched.

(*c*) The Occupiers occupy other premises about three-quarters of a mile apart, consisting of offices, warehouse, and stores at 86 Princes Street, Ipswich. The gross assessment of this property is 400*l.* The wholesale and retail business of the Occupiers as seedsmen, corn merchants and implement agents, as well as other seed-cleaning work, is carried on at this property. It has been held by the Assessment Committee that the user and occupation of it by the Occupiers is primarily non-industrial.

(*d*) Approximately 2000 tons of seeds are dealt with in the course of a year at the Hadleigh Road hereditament. With the exception of a very few tons the seed is as it comes from the threshing machine and in a rough, unclean and impure state. It undergoes upon the said premises treatment and preparation for sale. The methods of treatment and preparation vary according to the nature of the seed. The premises are not used for the mere purpose of warehousing any seed. About 95 per cent. of the seed that comes to the premises is within the provisions of the Seeds Act, 1920 (10 & 11 Geo. 5, c. 54), and the Statutory Rules and Orders made thereinunder. A copy of the Seeds Regulations, 1922, dated August 10, 1922, is annexed to this case marked B and forms part thereof.

(*e*) The following methods employed are given by way of example :—

Clover seed (Red and White).—This seed when received contains many kinds of weed seeds, some of which are "injurious" within the meaning of the Seeds Regulations, 1922, and immature and shrivelled seed and inert matter, such as sand and stalks, which are extracted, and must in

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certain instances be extracted, to comply with the provisions of the Seeds Act, 1920, and the Statutory Rules and Orders made thereunder. The weed seeds are extracted by means of numerous mechanical methods, some of which, in the case of seed which is unusually full of weeds, may have to be repeated several times. The use of machinery is essential, as it would be otherwise impossible to separate the good seed from the weed seed. Another separate, but essential, method is the extraction of a weed seed known as "Dodder." The Seeds Regulations, 1922, stipulate that the seed sold shall not contain more than one dodder seed in every four ounces of clover seed. Although dodder is sometimes found in English seed, it is found chiefly in red clover imported from Chili and Poland. English red clover is often received from the farmer in the husk, and when so received must first be decorticated or milled in a way similar to that used for treating trefoil and sainfoin. Thirteen sacks of uncleaned red clover yield approximately eight sacks when cleaned.

Trefoil and sainfoin.—These seeds when received are in the husk, and contain a considerable quantity of rubbish and many injurious weed seeds. Consequently it is necessary to subject them to several different machine methods in order to rid them of these impurities. The methods are as follows:—

(*a*) The cosh (which is the term applied to trefoil and sainfoin in the husk) when it comes from the grower is first of all rough cleaned from weeds by passing over three machines, which extract stalks, grass, and other rubbish.

(*b*) The cleaned cosh is then decorticated by passing through a huller, with the result that the husk and large unthreshed trefoil and sainfoin docks and rollers, &c., are separated from the good seed.

(*c*) A sample of the good seed is drawn and analysed. If it is found to be sufficiently free from weeds to be marketable nothing more remains to be done to it; otherwise it must be put through the machines until the required standard of purity is reached.

Grasses.—These have to be thoroughly cleaned before being put upon the market. Two distinct methods are adopted: (*a*) removal of weeds, etc., by revolving cylinders.

(*b*) Removal of chaff and other light impurities by passing over a jumper.

Root seeds.—(1.) Mangold. The cleaning of this seed, which is often a difficult matter, is accomplished by passing the seed as received over two machines. This method has often to be repeated two or three times before arriving at the required degree of purity. (2.) Turnips, swedes, &c. These are cleaned by passing over three separate machines—namely, a cuscuta, rotary and dosser, which extract: (*a*) the rough stalks, &c. (*b*) docks and broken seed, and (*c*) dirt, &c.

Cereals.—These as received from the farmer contain a proportion of other grain, weed seeds, dirt and rubbish. The cleaning is accomplished by passing the grain over two machines—namely, a Triumph corn-dressing machine and an adjustable rotary. The separation of tares and oats mixed and other mixed cereals is also done by passing such cereals over various machines.

(*f*) All seeds are submitted to one or other of the above treatments or similar treatments before they are put on the market. For this purpose they are passed by the Occupiers at the said hereditament through seed cleaning machines which vary according to the nature of the seed. In addition to the aforesaid treatment, seeds of red clover, single cut cow grass, white clover, and wild white clover are passed through Ritz machines for the purpose of breaking down the hard shell or resinous coating of the hard seeds. Without this treatment the hard seeds would not germinate properly. After treatment the seeds are no longer hard and can germinate properly.

A list of the machinery used by the respondents at the hereditament, marked C, a statement of the uses to which the said machinery is put by the respondents, marked D, and illustrations of the machines, marked E, are annexed hereto as part of this Case.

(*g*) The treatments are carried on as an integral part of the Occupiers' business of seed merchants. The Occupiers do not apply the said treatments or any of them to more than a negligible quantity of seeds belonging to third parties or for third parties. Approximately 84 per cent. of the seeds so treated by the Occupiers are sold by them to farmers, the sales to farmers being on retail and the sales to merchants on wholesale terms.

(*h*) The user of the floor space of the hereditament for the purposes aforesaid is as follows: Top floor. Approximately 2845 square feet. This floor is used for the purpose of receiving trefoil cosh ready for cleaning and milling. It also contains the hoppers for various machines on other floors. Fourth floor. Approximately 5130 square feet. This floor is used for the purpose of receiving all clover seeds, root seeds, and cereals for cleaning and passing the same to the machines on the floor below. Third floor. Approximately 7889 square feet. This floor is known as the second machine floor and contains eighteen machines and thirty-six root seed hoppers for drawing off and weighing. Second floor. Approximately 7889 square feet. This floor is known as the first machine floor and contains an electric motor, thirty-three machines and the dodder extracting plant, also a sample room. First floor. Approximately 7718 square feet. This floor contains various mixing bins and 112 spouts from the various machines on the floors above by means of which the cleaned seed and the impurities extracted are passed to this floor and then sacked and disposed of. Ground floor. Approximately 7674 square feet. This floor contains the trefoil huller, superintendents' office and dark rooms for the protection of seed. It has loading platforms for delivery of goods and is also used as the receiving floor for seeds and cereals from farmers. Kiln. Approximately 718 square feet. Adjoining the building is this kiln, which is used for drying seeds out of condition when received. Adjoining the seed cleaning factory is a corrugated iron building described in the Valuation List as a wool shed which is used for grading seed potatoes and for sifting clover meal by hand.

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(*i*) There are further annexed, as part of this Case, a box of samples of seeds as received by the Occupiers and demonstrating the result of the separation of the pure seed from the various impurities by the various processes indicated and referred to above marked F and a bundle of photographs of the hereditaments marked G.

9. No change in the nature of the individual seeds themselves takes place as a result of the treatments referred to except as is herein stated.

10. On the aforesaid facts the Revenue Officer contends :—

(1.) That the hereditament is not an industrial hereditament—(*a*) in that it is primarily occupied and used for the purposes of retail trade or business which are not the purposes of a factory or workshop ; (*b*) in that it is primarily occupied and used for the purposes of storage and wholesale distributive business and a retail shop within the meaning of the Rating and Valuation (Apportionment) Act, 1928, or a combination of such purposes ; (*c*) in that it is primarily occupied and used for the purposes of a seed merchant which are not the purposes of a factory or workshop.

(2.) That the determination and order of the Assessment Committee was wrong and that the said hereditament should be deleted or excluded from the Special List.

11. On the facts the Occupiers contend

(1.) That the hereditament is an industrial hereditament in that (*a*) it is occupied and used as a factory or workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920, and (*b*) it is not primarily occupied and used for the purposes of a retail shop or distributive wholesale business or storage or for any other purposes which are not the purposes of a factory or workshop within the meaning of the Factory and Workshop Acts, 1901 to 1920, or for any combination of such purposes.

(2.) That the hereditament is not primarily occupied and used for the purposes of retail trade or business.

(3.) That the purposes of a seed merchant for which the hereditament are in fact used as herein stated are the purposes of a factory or workshop as defined in the Factory and Workshop Acts, 1901 to 1920.

(4.) That the determination and order of the Assessment Committee was correct and should be confirmed.

12. The question for the opinion of this Honourable Court is whether upon the above statement of facts the Assessment Committee for the Ipswich County Borough Assessment Area came to a correct determination in point of law and if not what should be done in the premises.

The Revenue Officer and Occupiers have agreed that a judgment in conformity with the decision of this Court and for such costs as this Court shall adjudge may be entered on motion by either party at the Sessions next or next but one after such decision shall have been given.

A.

Notice of Appeal.

Take Notice that, acting in pursuance of s. 31, sub-s. 1, of, and Part I. of the Fifth Schedule to, the Rating and Valuation Act, 1925, as applied by s. 1 of, and para. 7 of the First Schedule to, the Rating and Valuation (Apportionment) Act, 1928, I, Ernest Owen Hines, the Revenue Officer who appeared before the Assessment Committee for the above named Assessment Area on consideration of an objection to the draft Special List for the Rating Area in relation to the hereditament above mentioned, being aggrieved by the decision of the said Assessment Committee in relation thereto, intend to appeal against the said decision to the Court of Quarter Sessions of the Peace for the said County Borough.

And Further Take Notice that the grounds of the said appeal are as follows :—

(1.) That the said hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied and used for purposes not those of a factory or workshop and

(2.) That the hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied or used for the following purposes or for a combination of such purposes, that is to say (i.) the purposes of storage ; (ii.) the purposes of distributive wholesale business.

B.

[The effect of the Seeds Regulations, 1922, appears to be sufficiently stated for the purposes of this report in the Special Case above set out.]

The Divisional Court (Avory, Talbot and Finlay JJ.) held that the business of the Occupiers was primarily a distributive wholesale business and that the hereditament was not an industrial hereditament.

The Occupiers appealed.

The Hon. R. Stafford Cripps K.C. and *C. L. Henderson* for the appellants. The Divisional Court was wrong in holding that this hereditament was used for the purposes of a distributive wholesale business, and not for the purposes of adapting seeds for sale. By s. 8 of the Seeds Act, 1920, seeds cannot lawfully be sold which do not conform to the Seeds Regulations, 1922. By far the greater part of the appellants' business consists in treating seeds for sale so that they may conform with the regulations. It cannot reasonably be suggested that the hereditament is not "premises wherein manual labour is exercised by way of trade in the adapting for sale" of seeds. The seed is converted into a saleable article and thereby given a much higher commercial value : *Inland Revenue* v. *Aberdeen Commercial Co.* (1) The hereditament is therefore a factory and is used for the purposes of a factory. This case differs from *Inland Revenue* v. *John Donaldson & Co.* (2), where one and the same hereditament was used not only as a factory but also for the purposes of a distributive wholesale business, and of storage, in which case Lord Hunter and Lord Fleming held that it was principally occupied for distributive purposes and Lord Sands that it was principally occupied for storage purposes. The hereditament in the present case is used exclusively for the purpose of a factory. The Divisional Court wrongly acted upon *Paterson* v. *Hunt.* (1) The case falls within the principle of *Fullers, Ld.* v. *Squire* (2) and *Hoare* v. *Robert Green, Ld.* (3)

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(1) 1930 S. C. 555, 560.

(2) 1930 S. C. 348.

Wilfrid Lewis (*Sir William Jowitt A.-G.* and *Colin H. Pearson* with him). The Rating and Valuation (Apportionment) Act, 1928, was not intended to benefit the merchant and distributor as such: *Inland Revenue* v. *Gunn, Collie & Topping,* per Lord Sands. (4) The appellants are merely merchants and distributors. They manufacture nothing. The Scottish case of *Inland Revenue* v. *McGill* (5) is on all fours with this case. There Lord Sands expressed the view that cleaning seed was not an industrial process. To bring a process within the expression "adapting for sale" there must be some alteration in the appearance of the article treated, as in *Squire* v. *Stanley Brothers* (6); *Fullers, Ld.* v. *Squire* (2); and *Hoare* v. *Robert Green, Ld.* (3) In *Henderson* v. *Glasgow Corporation* (7) it appears to have been assumed that the separation of saleable from unsaleable parts of refuse was an adapting for sale, but the argument was wholly directed to the question whether the adaptation, if any, was for the purposes of gain. Talbot J. in the Court below has laid down the true test: What change, if any, has taken place in the commodity or substance between the time when the Occupier receives it into the hereditament and the time when he discharges it therefrom? If it is received as raw material and discharged as a manufactured article, then the business is not a distributive wholesale business, but if it is received as raw material and discharged in the same condition the business is a distributive wholesale business. In the present case seed is received into and seed is discharged from the hereditament. With the trifling exception where the outer coating of the seed is broken to promote germination, the selfsame seeds which enter the hereditament subsequently leave them. Dirt

(1) (1909) 101 L. T. 571.
(2) [1901] 2 K. B. 209.
(3) [1907] 2 K. B. 315.
(4) 1930 S. C. 389, 394.
(5) Unreported.
(6) (1901) 84 L. T. 535.
(7) (1900) 2 F. 1127.

and sand and rubbish have been removed, but the seed itself leaves the premises as it entered them.

C. L. Henderson in reply.

Solicitors for appellants: *Herbert Smith & Co., for Westhorp, Cobbold & Ward, Ipswich.*

Solicitor for respondent: *The Treasury Solicitor.*

Cur. adv. vult. (1)

PRITCHARD (REVENUE OFFICER FOR THE CARDIFF CITY ASSESSMENT AREA) v. WILLIAM LEWIS AND SONS (OCCUPIERS).

Preparation of Seeds for Sale.

APPEAL from the decision of a Divisional Court upon a Case stated by order of Finlay J. with the consent of the parties under s. 11 of the Quarter Sessions Act, 1849.

1. The premises the subject of this appeal are a single hereditament situate at 13 Castle Street and 9 Womanby Street, Cardiff, described in the Valuation List as a shop and grain and corn stores.

2. On June 27, 1929, the Revenue Officer and the Occupiers appeared before the Assessment Committee for the Cardiff City Assessment Area on the hearing of an objection by the Occupiers to the omission of the said hereditament from the draft Special List prepared by the Rating Authority and transmitted to the Assessment Committee pursuant to the provisions of the First Schedule to the Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. 5, c. 44).

3. The Assessment Committee having heard and considered the said objection determined that the said hereditament was an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, and ordered that the hereditament should be included as such in the said draft Special List, and proceeded to apportion the net annual value thereof between the occupation and user of the said

(1) For the judgment see post, p. 502.

hereditament for industrial purposes and the occupation and user thereof for other purposes in the sums of 207*l.* and 290*l.* respectively.

4. The Revenue Officer being aggrieved by the said determination and order of the Assessment Committee duly entered on August 16, 1929, an appeal to the Court of Quarter Sessions for the City of Cardiff by lodging a notice of appeal with the clerk to the said Court and serving a copy of such notice upon the Occupiers. A copy of the said notice forms part of this case and is annexed hereto marked A.

5. The Revenue Officer and the Occupiers thereupon consented and agreed pursuant to s. 11 of the Quarter Sessions Act, 1849, to state the facts of the case in the form of a Special Case for the opinion of the Honourable Court and obtained the order hereinbefore referred to from the Honourable Mr. Justice Finlay dated November 18, 1929.

6. In pursuance of the said order the parties to the appeal have concurred in stating for the opinion of this Honourable Court the questions of law arising thereon and hereinafter set out the following facts :—

8. (*a*) The Occupiers carry on the business of corn and grain merchants at the aforesaid hereditament and elsewhere, and save for a shop which is included therein the said hereditament is registered as a factory and workshop within the meaning of the provisions of the Factory and Workshop Acts, 1901 to 1920. The total rateable value of the said hereditament is 497*l.*

(*b*) The hereditament consists of a shop having a frontage of 32 feet 9 inches on Castle Street, which is one of the main shopping centres of the city, and two warehouses, one of which is situate behind the shop and the other of which has a frontage in Womanby Street, which is a side street.

A bundle of plans of the said premises showing the areas of the aforesaid component parts forms part of this case and is annexed hereto marked B. The shop is a three-storey building and the warehouses consist of three floors. The ground floor and the first floor of the shop are occupied and used as a retail shop, offices and an implement showroom.

The second floor is used partly as a store and partly as a seed testing station. It is agreed between the parties hereto that that portion of the hereditament which is herein described as a shop is primarily occupied and used for the purposes of a retail shop and of storage. The warehouse behind the shop is occupied and used for the sole purpose of treating and preparing for sale the grain and commodities hereinafter described and dealt in by the Occupiers in the way of their business. For the purpose of treating and preparing for sale the aforesaid grain and commodities it is necessary that machinery should be used. A list of the machinery installed in this warehouse forms part of this case and is annexed hereto and marked C. The said list also describes by notes opposite the machines, the use to which they are put by the Occupiers. The total floor area in this warehouse is 5522 square feet and of that area 1080 square feet is covered with machinery.

The warehouse fronting Womanby Street is occupied and used for a purpose similar to that of the warehouse behind the shop, but the commodities therein dealt with are different. A list of the machinery, together with notes of the use to which it is put forms part of this case and is annexed hereto and marked D. The power by which the machinery in both warehouses is driven emanates from the Castle Street premises by means of an electric motor worked from the Corporation of Cardiff's mains.

With the exception of the oat clipping and the cake crushing machine the remainder of the machinery is in constant daily use. Such storage as there is in these warehouses is merely ancillary to the mechanical processes through which the grain and various commodities are passed, and to their subsequent dispatch to the customer in the ordinary course of business.

(*c*) The Occupiers carry on a wholesale as well as a retail trade, but none of their wholesale trade is done from the aforesaid hereditament. It is done from the docks where the Occupiers have storage facilities. None of the commodities dealt with in the two warehouses forming part of this hereditament pass thence to the docks to be stored, but after being so dealt with are disposed of to customers. Except for a negligible quantity the whole of the grain and commodities that come into the said warehouses are passed through the aforesaid machinery and not more than 3 per cent. of the whole of the seeds and commodities dealt with in the warehouses are retailed in the aforesaid shop. Ninety-seven per cent. of the output of the warehouses is sold direct to farmers, colliery owners, haulage contractors, &c., in fulfilment of orders received from those customers either at the said shop or elsewhere. The majority of orders are received through the Occupiers' travellers. The bulk of the Occupiers' trade is done in grain and commodities that never enter the said hereditament, but which are warehoused by them at the docks. The shop has been occupied by the Occupiers and their predecessors for fifty years or thereabouts as a retail shop, and such storage as there is (which is incidental to the trade there carried on) is done on the shop premises.

(*d*) The grain and commodities which are dealt with by the Occupiers in their aforesaid warehouses are among others oats, maize, barley, beans, hay, cake, and feeding stuffs for horses, cattle, and poultry. The total annual average weight of the aforesaid grain and commodities handled by the Occupiers in their said warehouses is 47,543 cwts. Of that quantity 37,483 cwts. are passed through machines as a process necessary to fulfil the requirements of their trade in the ingredients of feeding stuffs. Of the 10,060 cwts. which are not passed through machinery the major portion is required as an ingredient of feeding stuffs which are prepared by the Occupiers in the said warehouses. 6485 cwts. of oats come into the warehouses every year, and with the exception of approximately 460 cwts. the whole of this quantity is crushed or clipped. Oats which are used as a feeding stuff for horses or poultry must be clipped. Hay is converted into chaff and is either sold as chaff or used as an ingredient of feeding stuffs. All the maize is screened, and after that it is crushed or not according to the requirements of the trade. The cake is crushed and is either sold as crushed

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cake or used as an ingredient of feeding stuffs. The said warehouses are, to a large extent, used by the Occupiers for the purpose of making and preparing feeding stuffs for cattle, horses, poultry, and pigs. The Occupiers make and prepare in their said warehouses very large quantities of feeding stuffs of different varieties. Machinery is essential for the purposes of preparing the ingredients of these feeding stuffs. The Occupiers' feeding stuffs are made from one or other of the grains mentioned herein, after they have been treated as above mentioned, and from other commodities. The ingredients vary according to the nature of the animal for which the food is prepared.

(*e*) There is further annexed as part of this case a bundle of drawings illustrating the machines used by the Occupiers in their aforesaid warehouses marked E.

(*f*) The commodities sold by the Occupiers in their said shop do not amount to more than a small percentage of the total turnover of their business and are of an entirely different character from those sold by them in the two warehouses forming part of the said hereditament. The commodities sold in the shop consist largely of the sale of utensils connected with the user of all classes of seeds and feeding stuffs, and include to a smaller extent the sale of proprietary feeding stuffs for animals and small seeds such as bird seed and other seeds which do not (save for the 3 per cent. referred to in paragraph 8 (*c*) hereof) fall within the categories of those handled by them in the said warehouses. From the said warehouses are sold direct to customers, as set out in paragraph 8 (*c*) hereof, the commodities referred to in paragraph 8 (*d*) hereof.

9. On the aforesaid facts the Revenue Officer contends—

(*a*) That the hereditament is not an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

(*b*) That the hereditament should be excluded from the Special List.

(*c*) That the hereditament is not an industrial hereditament in that it is primarily occupied and used for one or more of

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the following purposes: (i.) A retail shop; (ii.) Storage; (iii.) Distributive wholesale business; (iv.) Other purposes which are not the purposes of a factory or workshop.

(*d*) That there was no evidence in law that the hereditament was primarily occupied and used for the purposes referred to in 9 (*c*) hereof or for any of them.

The Occupiers contend :—

(*a*) That the hereditament is an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

(*b*) That the hereditament should be included in the Special List.

(*c*) That the hereditament is not occupied or used primarily or at all for any of the purposes mentioned in paragraph 9 (*c*).

(*d*) That there was no evidence in law that the hereditament was primarily occupied or used for the purposes mentioned in paragraph 9 (*c*) or for any of them.

(*e*) That the determination and order of the Assessment Committee was correct and should be confirmed.

11. The question for the opinion of this Honourable Court is whether upon the above statement of facts the Assessment Committee came to a correct determination in point of law and if not what should be done in the premises.

The Revenue Officer and the Occupiers have agreed that a judgment in conformity with the decision of this Court and for such costs as this Court shall adjudge may be entered on motion by either party at the Sessions next or next but one after such decision shall have been given.

A.

Take notice that, acting in pursuance of s. 31, sub-s. 1, of, and Part I. of the Fifth Schedule to, the Rating and Valuation Act, 1925, as applied by s. 1 of, and paragraph 7 of the First Schedule to, the Rating and Valuation (Apportionment) Act, 1928, I, Herbert Alfred Pritchard, the Revenue Officer who appeared before the Assessment Committee for the above named Assessment Area on consideration of an objection to the draft Special List for the above named Rating Area in relation to the hereditament above mentioned, being aggrieved

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by the decision of the said Assessment Committee in relation thereto, intend to appeal against the said decision to the Court of Quarter Sessions of the Peace for the said City And further take notice that the grounds of the said appeal are as follows :—

(1.) That the said hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied and used for purposes not those of a factory or workshop ; and

(2.) That the said hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied or used for one or more of the following purposes, that is to say : (1.) The purposes of a retail shop ; (2.) the purposes of distributive wholesale business ; (3.) The purposes of storage.

C.

Second Floor.

Used in connection with the machines for preparing grain and seed corn.	Two storage bins.
For elevating corn, &c., to these storage bins.	One Friction Hoist.
For making and preparing sacks and bags.	Two Power Sack Sewing Machines (Singers).

First Floor.

For clipping, brushing, polishing and aspirating seeds, seed corn and grain of every description.	One Stevenson's Combined Machine, with steel cylinder and beaters, four brushes and four lambswool polishers.
For cleaning, screening, and grading seeds, seed grain, &c. Screening means extracting all weed seeds, foreign matter, and light and immature grains.	One Boby's "Cleenest" Machine, with three sets of riddles and twelve interchangeable screens, with automatic adjustable fan.

For crushing and grading cakes for cattle feeding.	One cake crusher with adjustable mouth.

D.

Second Floor.

For cutting hay into chaff, screening for size, and extracting dust from the finished article.	Large Five-Knife Chaff Cutter (Maynard) with elevator and sifter. Capacity 30 cwts. per hour. Dust extracting plant with six sleeves.
For elevating grain to crushing bins and conditioning grain preparatory to milling.	Elevator conveyor and damping worm.

First Floor.

For crushing grain.	Two large Corn Crushing Mills (Porteus) each with two twelve-inch steel rollers.
For kibbling, cracking or splitting beans, peas, maize, &c.	One Double Kibbling Mill, with two pairs of fluted rolls and grading screens (Porteus).
Used in connection with the corn milling and chaff cutting plant.	Twelve Connecting Bins, extending from machinery on second floor to above machinery on ground floor.
For extracting dust from the provender plant.	One dust collecting plant with fan, and six sleeve outlets.

Ground Floor.

For mixing and blending grain, chaff, meals, &c., for horse and cattle feeding.	Twelve Porteus Mixers, each with two double worms, emptying into two large diameter mixing worms, and two conveyor worms to six sagging off spouts.

Basement.

For removing stones, heavy dust, and other foreign matter from grain before passing over elevator to machinery.	One Double Corn Screen (Porteus).

The Divisional Court (Avory, Talbot and Finlay JJ.), following their decision in *Hines, Revenue Officer for Ipswich* v. *Counties Farmers Co-operative Association*, held that the business of the Occupiers was primarily a distributive wholesale business and that the hereditament was not an industrial hereditament.

The Occupiers appealed.

C. L. Henderson for the appellants. The appellants not only clean but bruise the seed. In *Inland Revenue* v. *Hutcheon* (1) premises in which this process was carried on were held to come within the derating provisions of the Act. As Lord Sands said in that case : " The fundamental element in the business is not distribution but treatment." The seed cannot be sold unless it undergoes the elaborate treatment applied to it by the appellants.

Wilfrid Lewis (*Sir William Jowitt A.-G.* and *Colin H. Pearson* with him) for the respondent. Even if it can be said that cleaning seed is a manufacturing process, nevertheless the appellants' premises are primarily used in preparing seed for their own business, which is a distributive wholesale business. The premises are therefore excluded from the expression industrial hereditament. The fact that the appellants' shop is valued much higher than their other premises shows that the latter are merely ancillary to the shop.

Henderson in reply.

Solicitors for appellants : *Herbert Smith & Co.*
Solicitor for respondent : *The Treasury Solicitor.*

Cur. adv. vult. (2)

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(1) 1930 S. C. 555.

(2) For the judgment see post, p. 502.

WEATHERHEAD (REVENUE OFFICER FOR THE BRADFORD ASSESSMENT AREA) *v.* ASSESSMENT COMMITTEE FOR THE BRADFORD ASSESSMENT AREA AND LAYCOCK, SON AND COMPANY, LIMITED (OCCUPIERS).

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WEATHERHEAD, R. O.
v.
LAYCOCK, SON & Co.

Grading and Sorting Wool.

APPEAL from the decision of a Divisional Court on a Case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90).

The Revenue Officer for the Bradford Assessment Area objected to the inclusion in a Special List as an industrial hereditament of a warehouse and office at 179, 181 and 183 Sunbridge Road, Bradford. The Assessment Committee of the said area having heard the objection decided that the said hereditament should remain in the Special List. On July 25 the Revenue Officer gave notice of appeal to the Quarter Sessions of the City of Bradford from the decision of the Assessment Committee on the ground that the said hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it was primarily occupied and used for the purpose of storage and the purposes of a distributive wholesale business and the purposes of wool sorting and not for the purposes of a factory or workshop. The Recorder dismissed the appeal. The Revenue Officer then applied to have a Case stated under s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, for the opinion of the King's Bench Division on the point of law arising thereon.

The following Case was stated accordingly:—

8. (ii.) The Occupiers of the hereditament Messrs. Laycock, Son & Co., Ld., are a firm of Wool Top merchants. The hereditament in question consists of a ground floor, three upper floors, and three basements. The ground floor is used by the Occupiers as offices, sample rooms, wool buyers' rooms, staff dining-room, cloak-rooms and canteen.

The first floor is used for wool bin rooms and for packing sorted wool into sheets ready for dispatch to combers.

The second and third floors are used for wool sorting.

The first basement is used for wool sorting and storing of bales of unsorted wool, assembling sorted wool, repairing sheets and top bags, and for receiving and dispatch rooms. The second basement is used for storing unsorted and sorted wool and for receiving and dispatch rooms. The third basement is used for the same purposes as those of the second basement, and for a garage as well.

8. (iii.) The hereditament comprises commodious well built premises at 179, 181 and 183 Sunbridge Road, Bradford, and is conveniently situated for the handling and dispatch of imported wool. Wool is imported from Australia, New Zealand and South America, graded and sorted, and then sent to the wool comber to be combed on commission before being merchanted as tops. Over 1000 bales of wool are sorted by the week. The Occupiers are known as top makers, but no top making takes place in the hereditament.

8. (iv.) The hereditament is occupied and used for the purposes enumerated in paragraph 8 (ii.) and (iii.) solely in connection with and ancillary to the Occupiers' trade or business as importers of wool and top manufacturers.

8. (v.) The hereditament is registered under the Factory and Workshop Acts, 1901–1920.

(vi.) The number of persons employed on the hereditament is 131, consisting of 71 wool sorters and apprentices, 27 office staff, 26 packers, 3 charwomen and 4 odd men.

9. A copy of the Special List, so far as it relates to the hereditament, marked A, and a copy of the appellant's notice of appeal, marked B, are annexed to and form part of this case.

10. At the hearing the learned Recorder ruled that the appellant was debarred from relying on s. 3, sub-s. 1 (*d*), of the Rating and Valuation (Apportionment) Act, 1928, on the ground that no point upon that sub-section had been taken before the Assessment Committee.

11. The questions for the opinion of the Court are: (1.) Whether the hereditament should not be excluded from the Special List on the ground that it is not an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

(2.) Whether the learned Recorder was not wrong in law in giving his ruling aforesaid with reference to s. 3, sub-s. 1 (*d*), of the said Act and, if so, whether on the true construction of s. 3, sub-s. 1 (*d*), the hereditament should not be excluded from the Special List on the ground that it is primarily occupied and used for purposes of storage within the meaning of the said sub-section.

(3.) Whether on the true construction of s. 3, sub-s. 1 (*c*), of the Act the hereditament should not be excluded from the Special List on the ground that it is primarily occupied and used for the purposes of distributive wholesale business within the meaning of the said sub-section.

(4.) Whether on the true construction of s. 3, sub-s. 1 (*f*), of the Act the said hereditament should not be excluded from the Special List on the ground that it is primarily occupied and used for the purposes of grading and sorting wool, which are not the purposes of a factory or workshop within the meaning of the said sub-section.

(5.) Whether on the true construction of s. 3, sub-s. 1 (*d*), (*c*) and (*f*), of the Act the hereditament, though occupied and used as a factory or (*sic*) is not primarily occupied or used for other purposes not being the purposes of a factory or workshop by reason of the fact that the said occupation and user of the hereditament is solely in connection with and ancillary to the trade or business of importing and sorting wool and storage and distributive wholesale business, which are not the purposes of a factory or workshop.

(6.) Whether upon the facts proved or admitted the hereditament is in law an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

The Divisional Court (Avory, Talbot and Finlay JJ.) held that the hereditament was primarily used for the purpose of sorting wool; that that was not a process of adapting for sale and therefore not a manufacturing process; that the hereditament was therefore not an industrial hereditament, and that it ought not to be inserted in the Special List.

The Assessment Committee appealed.

The Hon. R. Stafford Cripps K.C. and *C. J. Frankland* (*Montgomery K.C.* with them) for the appellants. This hereditament is registered under the Factory and Workshop Acts, 1901 to 1920, as a workshop. Wool sorting has been certified as a dangerous process under ss. 78 and 79 of the Factory and Workshop Act, 1901. This fact was not brought to the notice of the Divisional Court. Manual labour is expended in the manipulation and adaptation of the wool for sale, and the hereditament is primarily occupied and used for that purpose. It is therefore an industrial hereditament. This case is distinguishable from *M'Leod & Sons* v. *Inland Revenue* (1) in that there the hereditament was used principally as the business premises of a firm of wool brokers. The judgment of Lord Sands contemplates the present case, and the learned judge was not prepared to say that a hereditament such as that now in question would not be an industrial hereditament. This case is also distinguishable from *Inland Revenue* v. *John Walker & Sons* (2) in that the grading and sorting of wool requires the exercise of skill and discernment in selecting the materials which are to be blended, much greater than the skill necessary for blending whisky.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the respondent. It does not follow from the fact that a hereditament is a workshop that therefore it is used for the purposes of a workshop. The work done on this hereditament is only sorting and blending, neither of which is a manufacturing or adapting process. No change, physical or chemical, takes place in the wool as the result of the appellants' work and labour. Raw material it comes into the hereditament and raw material it goes out. This case is covered by *M'Leod & Sons* v. *Inland Revenue.* (1)

The Hon. R. Stafford Cripps in reply.

Solicitors for appellants: *Blundell, Baker & Co., for Mumfords & Gordons, Bradford.*

Solicitor for respondent: *The Treasury Solicitor.*

Cur. adv. vult. (3)

(1) 1930 S. C. 434.

(2) 1930 S. C. 372.

(3) For the judgment see post, p. 505.

KAYE (REVENUE OFFICER FOR THE DEWSBURY ASSESSMENT AREA) *v.* ASSESSMENT COMMITTEE FOR THE COUNTY BOROUGH OF DEWSBURY AND ERNEST BURROWS (OCCUPIER).

Wool Sorting.

APPEAL from the decision of a Divisional Court on a Case stated by the Rating Appeals Committee of the Quarter Sessions of the West Riding of Yorkshire. The Case was stated at the request of the Occupier for the opinion of the King's Bench Division in pursuance of s. 31, sub-s. 5, of the Rating and Valuation Act, 1925, and was as follows :—

1. On September 16, 1929, the Revenue Officer for the Dewsbury Assessment Area appeared before the Assessment Committee of the Dewsbury County Borough Assessment Area on the consideration of an objection by the Revenue Officer to the inclusion of a certain hereditament—namely, Providence Mills, Watergate, in the said county borough, occupied and owned by the Occupier, in the draft Special List for the rating area of the county borough as an industrial hereditament in accordance with the Rating and Valuation Act, 1925, the Rating and Valuation (Apportionment) Act, 1925, and the Local Government Act, 1929.

2. The Assessment Committee heard and dismissed the objection and decided to include the hereditament in the Special List. The Revenue Officer, being aggrieved by this decision, appealed to the Committee of the Quarter Sessions held at Wakefield and on October 29, 1929, upon hearing counsel for the Revenue Officer and for the Occupier, the Committee allowed the appeal subject to the opinion of the King's Bench Division.

3. The following facts were proved or admitted :—

(1.) The hereditament in respect of which the appeal was brought was described in the Special List as being No. 5816 owned and occupied by the Occupier and consisting of a rag warehouse, premises and appurtenances situate at Providence Mill, Watergate, Dewsbury.

(2.) The Occupier employs fifty-six women sorters and seventeen men at the hereditament. The said employees need to be highly skilled.

(3.) The total floor area of the hereditament is 5774 square yards, of which 1991 square yards are used for the preparation, ripping, clipping, grading, classifying, blending, and sorting of rags which consist of old garments on the one hand and tailors' new clippings on the other, and of which 3753 square yards are used (*a*) for the storage of rags awaiting this process ; (*b*) for the storage of rags partially prepared, graded, blended, and sorted; and (*c*) for the storage of rags after they have been so dealt with and before dispatch to the Occupier's customers.

(4.) The hereditament contains three electric cranes, one electric rag press, and numerous riddles upon which the rags are prepared, ripped, clipped, graded, and sorted.

(5.) The hereditament is registered as a workshop under the Factory and Workshop Acts, 1901 to 1920.

(6.) The rags after being ripped, clipped, graded, classified, blended, and sorted are sold wholesale to heavy woollen cloth manufacturers for use in the heavy woollen cloth industry.

(7.) The business of the Occupier carried on in the hereditament is the first process in the production of heavy woollen cloth and is a branch of the heavy woollen cloth manufacturing industry centred in Dewsbury and other neighbouring towns.

(8.) The further processes in the production of heavy woollen cloth which are carried on elsewhere consist of pulling and spinning into yarn which is used either alone or in conjunction with yarn spun from new wool in the manufacture of woven cloth.

(9.) In the heavy woollen manufacturing trade large quantities of woven patterned and coloured cloth are made from pulled rags without the addition of any new wool and without re-dyeing. Samples of such woollen cloth are exhibited hereto and form part of this case (Exhibit A).

(10.) The rag trade is an integral and necessary section of the heavy woollen trade.

(11.) Some heavy woollen manufacturers sort rags for their particular manufacturing processes to a limited extent; but the greater number do not in practice make for their use a sufficient quantity of certain grades of rags and cannot in practice dispose of surplus grades of sorted rags not required by themselves.

(12.) The Occupier buys bales of miscellaneous rags mixed and unsorted from various parts of the world and also in the British Isles, and the rags so bought consist partly of old garments and partly of tailors' new clippings.

(13.) The Occupier sells assortments of rags adapted to particular trade descriptions or to the special needs of particular customers.

(14.) The rags so bought include in the way of fibrous materials wool, cotton, silk, artificial silk, jute, hemp, imitation silk, and imitation wool. Individual rags contain combinations of these materials.

(15.) The rags so bought are of no use for the purposes of the woollen cloth manufacturers until they have been ripped, clipped, sorted, graded, blended, or prepared as above described.

(16.) The Occupier produced to the Court a collection of 296 different sorts of fibrous materials as showing the effect upon the rags bought by him of the ripping, clipping, sorting, grading, blending, and preparation above described carried out upon the hereditament, such materials being recognized commodities in the rag trade, and well known to manufacturers of shoddy and cloth. This collection is exhibited to and forms part of this case (Exhibit B).

(17.) The following processes are carried on by the Occupier in the hereditament in order to produce the said 296 sorts: (*a*) sorting, ripping, clipping, grading and classification of all kinds of rags into their respective fibrous groups; (*b*) removal of dirt and foreign matter from the rags; (*c*) division or separation of rags into their component parts of different fibrous origin by clipping, ripping, or otherwise dividing or disintegrating old garments, by removing cotton stripes and selvedges from woollen tailors' clippings and unwanted colour stripes and selvedges whether of wool or cotton from the clippings and by cutting out darns, clocks, seams and unwanted coloured parts from knitted garments. The Occupier produced to the Court examples of a garment disintegrated as above described; rags clipped as above mentioned; rags from which darns and unwanted materials have been separated; and rags from which unwanted colours have been removed. These examples are exhibits to and form part of this case and are lettered respectively C, D, E and F; (*d*) sorting and re-sorting of rags with the object of supplying customers' requirements as to nature, colour and quality of rags to satisfy a demand for a particular type of cloth or yarn; (*e*) blending rags of different nature, quality and colour so that cloth according to a customer's requirements can be made therefrom; (*f*) sorting and blending of rags so as to render dyeing or re-dyeing unnecessary and so as to produce the required shade and finish in the manufactured cloth.

(18.) The Occupier deals with 95 per cent. of the total quantity of rags received by him according to the processes described in clause 17 of this case.

(19.) The Occupier blends from 25 per cent. to 50 per cent. of the rags dealt with by him.

(20.) By the processes carried on by the Occupier, rags bought as mixed rags in bulk as aforesaid are separated into sorts also in bulk of widely different values, quality and shade. Samples of sorts of different value are an exhibit to this case (Exhibit G).

4. A plan of the hereditament is annexed to and forms part of this case; also a copy of the entry in the Special List as allowed by the Assessment Committee in relation to the hereditament and as subsequently amended.

5. The Revenue Officer contended that the hereditament was not an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, because it was and is primarily occupied and used for one or more of the following purposes, that is to say: (*a*) the purpose of distributive wholesale business; (*b*) purposes of

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storage; (*c*) purposes of rag merchants arranging materials for the use of manufacturers, which are not the purposes of a factory or workshop; and that in law the hereditament ought not to be included in the Special List.

6. Our attention was drawn to *Paterson* v. *Hunt.* (1)

7. The Assessment Committee and the Occupier contended that the hereditament was an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, in that it is a workshop within the meaning of the said section, and that the proviso to the said section had no application to the hereditament.

8. We gave our decision in the following words: The Bench realizes that the case is of considerable importance to the woollen trade in the West Riding, and we have done our best to come to a proper conclusion on the construction of the particular Act. We quite recognize that the work which is done by Mr. Burrows [the Occupier] is a very important part of the trade of the woollen cloth manufacturer, but our duty is to put a proper construction so far as we can on the wording of the Act, and we must say at once that there is a division of opinion on the Bench. The majority, however, are of opinion that this particular business is primarily a distributive wholesale business and, that being so, the appeal will be allowed with costs. We added that the hereditament should be deleted from the Special List.

9. The question for the opinion of the Court is whether we were right in holding that the hereditament was not an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, and in allowing the appeal. If the Court should be of opinion that we were right in so holding our order is to stand; if the Court should be of opinion that we were wrong in so holding, the order is to be reversed or varied or such other order is to be made as to the Court shall seem right.

The Divisional Court (Avory, Talbot and Humphreys JJ.) affirmed the decision of the Quarter Sessions.

The Occupier appealed.

(1) 101 L. T. 571.

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Comyns Carr K.C. and *William Stewart* for the appellant. The Quarter Sessions were wrong in law in holding that this hereditament was occupied and used primarily for the purposes of a distributive wholesale business. They have strained the principle of *Paterson* v. *Hunt* (1) so as to cover a case beyond its compass. In that case, as Darling J. said, "when the sorting had been done, the bits of cloth remained exactly what they were before, except that all the red ones were together and all the blue ones were together, the thick ones together and the thin ones together." That would not be "adapting for sale" within the meaning of s. 149, sub-s. 1 (*c*), of the Factory and Workshop Act, 1901. If that was all that was done here the decision of the Quarter Sessions could not be questioned. The skill which is sufficient for that operation is trifling. It bears no resemblance to the skill and discernment exercised in this hereditament. The rags which come into the hereditament are of no use to anybody except the appellants and those carrying on the same business. When they leave the hereditament they are a well known commodity in the woollen trade. Only by misapplying the principle of *Paterson* v. *Hunt* (1) could the Quarter Sessions have decided as they did. The Divisional Court felt themselves bound by the previous decision of their own Court in *Bradford Revenue Officer* v. *Bradford Assessment Committee and Laycock, Son & Co.* (2) and by two decisions of the Scottish Court in *M'Leod & Sons* v. *Inland Revenue* (3) and *Inland Revenue* v. *John Walker & Sons* (4), none of which are binding on this Court.

Wilfrid Lewis and *Colin H. Pearson* (*Sir William Jowitt A.-G.* with them) for the respondent. The question in this appeal is whether *Inland Revenue* v. *Easson Brothers* (5) was rightly or wrongly decided. That it is a question of some difficulty is clear from the difference of opinion in the Scotch Court, where Lord Hunter and Lord Fleming decided one way and Lord Sands the other. The majority followed *Paterson* v. *Hunt* (1) in a case which is practically on all fours with the

(1) 101 L. T. 571.
(2) (1930) 46 Times L. R. 506.
(3) 1930 S. C. 434.
(4) 1930 S. C. 372.
(5) 1930 S. C. 480.

present. It would be unfortunate if Courts of co-ordinate jurisdiction in Scotland and England should come to opposite conclusions on the same facts in construing an Act which was intended to apply to both countries, so that the same hereditament if situate in England would be derated while if in Scotland would be rateable.

Comyns Carr K.C. in reply.

Solicitors for appellants: *Torr & Co., for Clough, Crabtree & Ineson, Cleckheaton.*

Solicitor for respondent: *The Treasury Solicitor.*

Cur. adv. vult. (1)

BARTON (REVENUE OFFICER FOR THE STEPNEY ASSESSMENT AREA) *v.* R. TWINING AND COMPANY, LIMITED (OCCUPIERS).

APPEAL from the decision of a Divisional Court upon the following Case stated under s. 40 of the Valuation (Metropolis Act, 1869.

1. At a Court of Quarter Sessions held in and for the County of London on December 12, 1929, the Revenue Officer for the Stepney Assessment Area appealed against the decision of the Stepney Assessment Committee to include in the Special List for the Rating Area of the Metropolitan Borough of Stepney as an industrial hereditament the hereditament therein described as follows:—Occupiers: R. Twining & Co., Ld. Premises: Warehouse and office, 28 Wellclose Square. Assessment No. 6/10859.

2. The following facts were admitted or proved before us:—

(*a*) The said hereditament consists of a building of basement, ground floor, and three floors in the sole occupation of the Occupiers.

(*b*) The said hereditament comprises: Basement, store for packing cases. Ground floor: two small offices, store and dispatch department. First floor: mess-room, coffee grinding and packing room, and dispatch room. Second floor: coffee grinding, blending and mixing rooms. Third floor: coffee roasting department.

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(1) For the judgment see post, p. 508

(*c*) The said hereditament is occupied and used solely for the purposes enumerated in paragraph 2 (*b*). The coffee is ground, roasted and blended by machinery some of which is actuated by electricity and then packed and sent to the two shops of the Occupiers hereinafter mentioned. None of the coffee ground, roasted, blended, or mixed on the said premises is coffee belonging to third parties.

(*d*) The Occupiers are a well-known firm of tea and coffee merchants, with shops at 216 Strand, W.C. 2, and 72 Wigmore Street, W. 1.

(*e*) The hereditament is registered under the Factory and Workshop Acts, 1901 to 1920.

(*f*) The number of persons engaged on the said hereditament is thirteen.

(*g*) The appellant is the Revenue Officer for the Stepney Assessment Area.

3. The Revenue Officer contended :—

(1.) That the hereditament is not an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied and used for purposes not those of a factory or workshop.

(2.) That the said hereditament is not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it is primarily occupied or used for one or more of the following purposes, that is to say: the purposes of distributive wholesale business; the purposes of storage; the purposes of roasting and blending and packing of coffee, in the business of coffee roasters, and merchants, which are not the purposes of a factory or workshop.

(3.) That even if the hereditament is a factory or workshop, it is not occupied or used as a factory or workshop, because the occupation or user is incidental or ancillary to another purpose which is not the purpose of a factory or workshop—namely, that of coffee merchants, blenders, and roasters.

(4.) That upon the facts the said hereditament is not in law an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

(5.) That on the true construction of s. 3, sub-s. 1 (*f*), of the Rating and Valuation (Apportionment) Act, 1928, the purposes of coffee merchants and roasters are not the purposes of a factory or workshop.

(6.) That on the true construction of s. 3, sub-s. 1, of the Act of 1928, the onus of satisfying the Court that the hereditament in question was an industrial hereditament is upon the Occupiers.

4. In consequence of other decisions given by us, we did not call upon the Occupiers to argue or call evidence.

5. We were of opinion—

(1.) That the operations carried on on the said hereditament were, as a matter of fact and of law, a manufacturing process in which manual labour was exercised and that mechanical power was used in and of the process.

(2.) That the hereditament was primarily occupied and used for the purpose of carrying on the manufacturing process aforesaid.

(3.) That it was immaterial to consider whether the products of the manufacturing process were sold to third parties immediately or through the medium of some other business carried on by the Occupiers elsewhere than on the hereditament, because in either event the Occupiers would receive a manufacturer's profit and therefore, according to the ordinary use of language, the manual labour exercised on the hereditament was exercised by way of trade or for purposes of gain.

(4.) That the hereditament was primarily occupied and used for the purposes of a factory or workshop, and was therefore an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928.

6. We accordingly give judgment in favour of the Occupiers with costs.

7. The question for the opinion of the Court is whether upon the facts there was evidence upon which we could

reasonably so decide in point of law. If the Court answer the question in the affirmative the order is to stand, if not, the Court is respectfully requested to reverse or vary the order or to make such order as the Court shall think fit.

The Divisional Court (Avory, Talbot and Humphreys JJ.) held that the hereditament was primarily used for the purposes of a distributive wholesale business and that it was therefore not an industrial hereditament and ought not to be included in the Special List.

The Occupiers appealed.

Sir Walter Schwabe K.C. and *H. W. Wightwick* for the appellants. The Divisional Court have laid upon the appellants the burden of showing that they do not come within the proviso to s. 3 of the Act of 1928. The burden is really upon the respondent to show that the decision of the Court of Quarter Sessions in favour of the appellants is wrong. This, it is submitted, the respondent fails to do ; first, because the hereditament is a factory within s. 149, sub-s. 1 (*c*), of the Factory and Workshop Act, 1901, being premises wherein manual labour is exercised for purposes of gain in the adapting of coffee beans for sale as ground coffee, and wherein mechanical power is used in aid of that process, and the hereditament is used for the purposes of such a factory, and it is immaterial that the product of the factory is sold by the appellants elsewhere ; and secondly, because at least there is evidence on which the Court of Quarter Sessions could find that the occupation and user of the hereditament were for the purposes of such a factory.

Colin H. Pearson (*Sir William Jowitt A.-G.* and *Wilfrid Lewis* with him). The work done in the hereditament is merely ancillary to the appellants' primary business of coffee merchants, a distributive wholesale business. Premises in which work is done on other persons' material may be a factory ; but premises in which work is done on one's own material to produce an article for others to sell cannot constitute a factory ; and still less can premises in which work is done on one's own material to produce an article which one sells oneself, which is the present case.

[SCRUTTON L.J. Can there not be a jam factory in the country to supply the occupier's shop in London?]

No, if it is merely ancillary to the business of the shop, as the hereditament is in the present case.

Counsel were not called on in reply.

Solicitors for appellants: *Beachcroft, Hay & Ledward.*
Solicitor for respondent: *The Treasury Solicitor.*

Cur. adv. vult. (1)

July 11. The following written judgments were delivered:—

SCRUTTON L.J. The Court has heard this group of seventeen appeals together, as they are the first cases to come to the Court involving the construction of the Act of 1928, commonly known as the Derating Act, though the actual benefit by derating was conferred by the Act of 1929. So far as one can conjecture, the object of the two Acts was to benefit the manufacturers and industrial producers of England and Scotland by relieving them of a proportion of their rates, at the expense of British taxpayers. The language of the Acts has given rise to great difficulties and differences of opinion as to law and facts: the result so far has been that industries which no one would suppose to be in any need of pecuniary assistance, such as breweries, tobacco factories and newspaper proprietors, have obtained the benefit of relief from their rates. We, however, have not to frame an equitable scheme of relief from taxation; our duty is to endeavour to interpret the words in which Parliament has expressed its intention; if the result does not satisfy Parliament, it can express its intention more accurately by amending legislation.

Our task has not been made easier by the difference in appeal procedure between England and Scotland. In England, when a Special List of those entitled to relief has been prepared, there is an appeal to the Assessment Committee to erase a particular hereditament from, or insert it in, the List. From the decision of the Assessment Committee, there is an appeal to Sessions. This, however, may be by-passed by a Special Case direct from the Assessment Committee to the Divisional Court under the Quarter Sessions Act, 1849, also known as Baines's Act. If this course is not adopted, there is an appeal from the decision of Sessions to the Divisional Court. This appeal however is, by s. 31, sub-s. 5, of the Rating Act, 1925, an appeal by Special Case on points of law. From the decision of the Divisional Court there is an appeal to this Court, and thence to the House of Lords. Thus there are certainly four, and possibly five appeals before a final decision is obtained. The procedure in Scotland by the statute is much simpler. From the decision of the Assessment Committee there is only one appeal, to a Court constituted under the Land Valuation Act, 1854, and subsequent amending Acts and Acts of Sederunt. This Court is composed of three judges nominated by the Court of Session: in the present case, Lord Hunter, Lord Sands and Lord Fleming. Thus one can reach the final Court in Scotland in two appeals. As a result, when the English Divisional Court reached its first appeals before Easter, 1930, it found itself confronted by a large volume of final decisions of the Scotch Court. We have before us a volume containing nearly one hundred Scotch decisions, many of them relating to trades and hereditaments very similar to those coming before the English Courts. The English Courts are not of course bound by those decisions, though they are naturally carefully considered by us; for it is eminently undesirable that exactly similar hereditaments should be derated in Scotland, but not in England. The matter is complicated by two facts which force themselves on our attention as soon as we consider the Scotch decisions: the first is that the two senior judges of the Land Valuation Court arrived at widely and persistently differing views as to the proper construction of the Act, while the third, taking an independent attitude, sometimes agreed with one, sometimes with the other of his seniors, so that there are many majority decisions. The second is that there is sometimes

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(1) For the judgment see post, p. 500.

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a distinct and obvious change of direction in the decisions, as the number of cases increases and the effect of the statute becomes more fully appreciated. The change of view involves no discredit to the eminent Scotch judges concerned in interpreting this difficult Act. While I do not refer in detail to all the relevant Scottish decisions, I may be permitted to say that in general, though not always, I concur in the opinions expressed by Lord Sands, whose judgments I have read with great profit.

Another difficulty is occasioned by the procedure adopted under Baines's Act, of trying to state a case by agreement of the parties. Some of the important questions are probably mixed questions of law and fact, such as the "primary purpose" of the hereditament. So far as this is fact, the parties stating the case have of course been unable to agree on it, and it is suggested that in some way the Court is to determine the fact as well as the law, reliance being had on s. 25 of the Judicature Act, 1925, which provides that the Court may draw inferences of fact. In view of the fact that the Rating and Valuation Act, 1925, by s. 31 restricts the Special Case to questions of law, I do not think the Court can be asked to determine the fundamental facts of the case. I agree with the view taken by Avory J. in *Hickton* v. *Hodgson* (1), where he says: "I wish first of all to deal with the point that was taken under the Judicature Act, 1894" (now 1925). "As to that I go a little farther than my Lord with regard to the effect of that statute on these appeals from Quarter Sessions. I do not at all accept the contention that the provision that this Court may draw any necessary inference entitles this Court to reverse the findings of the Quarter Sessions upon questions of fact. I think that it only means that upon the facts which are either proved or admitted the Court may draw any inference necessary to enable it to determine the question of law which arises upon it, and it is on that view that I propose to deal with the case which is now before us." The Court can set aside a finding of fact on the ground that there is no evidence on which such

(1) (1913) 78 J. P. 93. 95.

a finding can be made, or on the ground that the tribunal has proceeded on a wrong principle of law in the consideration or exclusion of evidence. It cannot alter a finding of fact found below except on these grounds, and in my view the Court is not authorized to make a finding of fact vital to the case, because the parties stating the case under Baines's Act have not been able to agree it. The cases stated under Baines's Act which we have considered have never found as a fact the primary purpose of the hereditament, which so far as it is a question of fact, the parties have naturally never agreed, not wishing to state themselves out of Court. I think, so far as cases under the Rating and Valuation (Apportionment) Act, 1928, known as the Derating Act, are concerned, the judges of the King's Bench Division would do well not to authorize the stating of cases under Baines's Act, but to leave the Sessions to state cases and find facts in the ordinary and proper way. Where, as often happens, the question is one of degree, in my view it is purely one of fact, and no appeal by way of Special Case is possible.

Questions were discussed as to the burden of proof. I do not think the question arises in any of the cases we have heard, and it is generally academic. In my opinion the applicant for derating must prove his case. He must show (1.) a factory or workshop on some part at least of the hereditament; (2.) he need not show that the primary purpose of the hereditament is a factory purpose, but should, I think, show that the factory work done on the hereditament is so substantial considering the area, value, and nature of work done and number of people employed, that it cannot be said that the primary purpose of the hereditament is non-factory. It is quite possible that factory and non-factory purposes may be nearly equally balanced, in which case it is impossible to find one primary purpose. The hereditament is then industrial, but there must be apportionment under s. 4 of the Act of 1928. On an appeal, by r. 9 of the Assessment Appeals Rules, 1927, "the appellant shall begin," and in my view he must satisfy the Court that the decision below is wrong. If it is the practice, as we heard, in some Sessions, if the respondent does not appear, to allow the appeal without more, in my opinion that practice is erroneous. The appellant must show that the existing decision is wrong.

With these general observations I come to the question of the true construction of the Derating Act. This Act, which provides the machinery for derating, was passed, in the words of its title, "With a view to the grant of relief from rates in respect of certain classes of hereditaments" and "for the distinction in valuation lists of the classes of hereditaments to be affected." The amount of relief to be given to hereditaments in these lists is settled by the Local Government Act, 1929 (19 Geo. 5, c. 17), s. 68.

The hereditaments to be relieved are found in the Derating Act of 1928: agricultural hereditaments in s. 2; industrial hereditaments in s. 3; freight transport hereditaments in s. 5. The present cases are concerned with industrial hereditaments, as defined in s. 3. "Industrial hereditament" means (a word which involves a comprehensive definition, and not like the word "includes" a definition which leaves something yet to be defined) "a hereditament . . . . occupied and used . . . . subject as hereinafter provided, as a factory or workshop."

This involves two questions: First, what is a factory or workshop? This is answered by sub-s. 2; that except as to a particular matter therein mentioned "factory and workshop," have the same meanings as in the Factory and Workshop Acts, 1901 to 1920. Secondly, what is the subsequent provision which completes the definition? This will be found in the proviso in sub-s. 1, which is part of the meaning defined. The proviso reads: "Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory or workshop if it is primarily occupied and used for the following purposes or for any combination of such purposes, that is to say—(*a*) the purposes of a dwelling-house; (*b*) the purposes of a retail shop; (*c*) the purposes of distributive wholesale business; (*d*) purposes of storage; (*e*) the purposes of a public supply undertaking; (*f*) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory or workshop."

This makes the complete definition to be "A hereditament . . . . occupied and used . . . . as a factory or workshop but not primarily used for any one or more of the specified purposes" —the last of which are "any other purpose . . . . which are not those of a factory or workshop."

It is clear from this definition, and if not clear would be made clear by the language of s. 4, that a hereditament will be used as a factory or workshop if part of it is so used. Sect. 4 distinguishes in the industrial hereditament the part used for industrial purposes, that is factory purposes, and the part used for other purposes.

At this point the question occurs which has given rise to the vital difference of opinion between the English Divisional Court and the Scotch Court, and which is of considerable pecuniary importance. In ascertaining the primary purpose of occupation and use, is the Court limited to what is happening on the hereditament itself, or may the Court look at what is going to be done with the manufactured product outside the hereditament itself? To take concrete cases, one of the purposes specified in the proviso is that "of a retail shop." Supposing a factory in Birmingham makes goods for sale at a retail shop belonging to the same owner at Leeds, can the Birmingham hereditament be properly said to be occupied and used primarily for the purposes of the retail shop at Leeds, in which case it will not be derated?

Another of the purposes specified in the proviso is: "The purposes of distributive wholesale business." Suppose the owner of the Birmingham factory sells all its product wholesale from his offices in Leeds, Liverpool and Manchester. Can the Birmingham hereditament be said to be primarily used and occupied for the purposes of distributive wholesale business? It is obvious, and the Attorney-General admitted, that if this construction is correct, there will be practically no derating, for almost every factory makes its goods to be sold wholesale or retail. If that is to be treated as the primary purpose there is an end to derating.

The difference between the English Courts and the majority decision of the Scotch Courts will be found stated by Talbot J. in his judgment in the *Wimbledon Rating Authority* v. *Kerslake.* (1) He treats himself as bound by the English decision in *Stoke-on-Trent Revenue Officer* v. *Stoke-on-Trent Assessment Committee*, the *Potteries Electric Traction Co.'s Case* (2), to hold that the Court is not merely to look at the way in which the hereditament is used but the reason why it is so used; that this meaning is involved in the word "purposes"; and that the reason may be found outside the hereditament. For instance, in *Union Lighterage Co.* v. *Barton, Poplar Revenue Officer* the Divisional Court declined to derate a barge repairing yard, though the Court found that the owner of the yard was using it as a factory; and gave as the reason for deciding as they did the fact that the owner was carrying on outside the yard in the barges repaired the business of a carrier by water, and to carry by water is not a factory purpose. Also in *Moon, Lambeth Revenue Officer* v. *London County Council* the Divisional Court refused to derate a printing establishment, though it is a statutory factory, because the Council carries on outside the establishment a tramway undertaking for which the establishment prints tickets, and to run trams is not a factory purpose. The judges treat themselves as bound to decide this by their decision in *Stoke-on-Trent Revenue Officer* v. *Stoke-on-Trent Assessment Committee*, the *Potteries Electric Traction Co.'s Case* (2), where on large premises partly used as a garage for omnibuses the Omnibus Company had a factory for repairing omnibuses and making spare parts for them. The Omnibus Company were treated as running this factory for the purposes of their trade of running omnibuses, which was not a factory purpose.

In my opinion this view of the word "purposes" if sound would practically destroy the Derating Act, for almost every factory is run for the purpose of selling either wholesale or retail, and frequently outside the hereditament in question,

(1) (1930) 46 Times L. R. 437.
(2) (1930) 46 Times L. R. 434.

the goods made in the factory, or for using those goods in the trade of the owner carried on outside the hereditament. If we are to use these facts to discover the purpose for which a hereditament which is a factory is being used; if it is ours to "reason why" it is being used, we shall leave nothing worth mentioning to be derated; and the Act intended to give extensive relief. The Scotch Courts have not gone outside the hereditament to find the purpose. In *Inland Revenue* v. *Clan Line Steamers, Ld.* (1), the Court unanimously derated a ship repairing yard owned by the Clan Line and principally used as a factory for the manufacture of parts for the repair of the ships of the Clan Line. Lord Sands says this was the ulterior purpose but not the purpose in the view of the Derating Acts. It is, I think, obvious from the Divisional Court judgments—see the judgment of Talbot J. in *Wimbledon Rating Authority* v. *Kerslake* (2)—that they would have decided *Inland Revenue* v. *Clan Line Steamers, Ld.* (1), the other way, because the trade of running ships was not a factory purpose. I am not sure that the Divisional Court really appreciated the wide principle they were apparently laying down, for when they came to deal with newspapers, though the printing establishment of the newspaper was used as a factory for the reason that the proprietors of the newspaper were carrying on a trade of selling newspapers, the Court yet derated that part of the newspaper hereditament which was used as a factory.

It was sought to found an argument for treating the ulterior purpose, as the purpose referred to in the Act, in the language of the heading (*e*) in the proviso to s. 3, sub-s. 1—namely, "the purposes of a public supply undertaking," further defined in s. 3, sub-s. 4. Now electrical stations, in which electrical energy is generated for supply by way of trade, are expressly made a factory by Part I., No. 20, of the Sixth Schedule to the Factory Act, 1901 (1 Edw. 7, c. 22). Gas and water undertakings are not expressly mentioned in the Factory Act, but obviously contain "factories." It may be that this is merely an express

(1) 1930 S. C. 445.

(2) 46 Times L. R. 347, 439.

exclusion of a matter which would otherwise come within the definition, just as Parliament might have expressly excluded breweries from derating, because no one would consider them depressed industries needing protection. It may be also that this part of the proviso is intended to cover cases where the principal use and purpose of the hereditament is a public undertaking, one that must be carried on by the obligation of a statute, and one that therefore needs no "relief" to secure its being carried on. Anyhow I am unable to extract from the purpose (*e*) any principle which would lead to the conclusion that if a factory is carried on in the hereditament, in order that its products may be sold wholesale outside the hereditament, it is therefore not to be derated, because its primary purpose is wholesale distribution of the thing made.

In my view the proviso of the Act dealing with primary purpose was intended to cover the following state of things. You find on a hereditament something which is a "factory or workshop," but you also find on the hereditament something which is not a factory or workshop, a dwelling-house, a retail shop, the offices of a distributive wholesale business, a large store. If after considering the relevant evidence, area of the various uses of the hereditament, their respective values, comparison of the amount of work done under each head, you are satisfied that the primary, principal, substantial use and purpose of the hereditament is non-factory, you do not derate; for the hereditament is not industrial. Unless you are satisfied of this you do derate, but may under s. 4 apportion the hereditament between industrial (or factory) and non-industrial purposes. The apportionment section however leans towards derating; for if the total value of the hereditament is under 50*l.* you do not trouble about carving out any non-industrial part; and if the value is over 50*l.* you only carve out a non-industrial part if it exceeds one-tenth of the industrial part; and only then as to the excess over one-tenth. Cases illustrating this would be where there is in a large factory either a small dwelling-house or a small office for a limited class of business; there the primary purpose would not be that of a dwelling-house or wholesale business. On the other hand, if in a large shop, or a large dwelling-house, there is a small machine which makes a statutory factory, the primary, principal, substantial purpose would be that of a shop or dwelling-house, and the hereditament would not be derated. But because it is found that the products of the factory are used outside the hereditament in the trade of the owner, wholesale or retail, this finding appears to me to be no reason for treating the primary purpose of the use of the hereditament as other than a factory purpose. The use and purpose must be limited to the area of the hereditament.

As I have said, I think the result of the Divisional Court judgments on this point is, by considering the ulterior purpose, almost to destroy derating; and some of their language seems clearly to point to ulterior purpose as one to be considered. But they also put the matter on another ground. In *Stoke-on-Trent Revenue Officer* v. *Stoke-on-Trent Assessment Committee*, the *Potteries Electric Traction Co.'s Case* (1), which they treat as the leading case, the Lord Chief Justice came to the conclusion that whatever savoured of a factory or workshop purpose was only ancillary to the primary purpose of an omnibus company's undertaking. Avory J. said (2) that what was being done was done as ancillary to the business of carrying passengers: "The work which is carried on is not being done by way of trade or for purposes of gain within the meaning of the Act"—i.e., the Factory Act, 1901. He and Lord Hewart C.J. both rely on the decision of *Nash* v. *Hollinshead* (3), which must be carefully examined. Branson J. did not think that *Nash* v. *Hollinshead* (3) had got very much to do with the case, an opinion in which I respectfully concur, but rested his judgment on the position that the hereditament was not occupied for factory purposes but for the purpose of the omnibus business, which seems to be a clear statement of the "ulterior purpose" doctrine, without a recognition of its destructive effect on derating.

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(1) 46 Times L. R. 434.
(2) 46 Times L. R. 437.
(3) [1901] 1 K. B. 700.

The Attorney-General (while, as I understand, being inclined to admit that the language of the Divisional Court was capable of being interpreted as laying down a doctrine of ulterior purpose, fatal to any extensive derating) said that that was not his argument. He expressed his argument, if I understand it (I am not sure that I did), thus: that to get a factory you must make with a "gainful" purpose; and that if you merely make not to sell but to help you to carry on your business, or make for yourself, that is not a "gainful" purpose, within the meaning which he said was to be extracted from the Factory Acts and the decisions of the Courts. As I understood him, the barge yard in *Union Lighterage Co.* v. *Barton*, wholly devoted to repairing with the help of machinery the barges of that company, was not a factory, because the barges were not made or repaired to be sold, but only as a means of carrying on elsewhere the trade of carrying by water; the repairs made profits indirectly, not directly.

To appreciate whether this argument is valid, it is necessary to examine the statutory provisions of the Factory and Workshop Acts. By s. 149 of the Factory Act, 1901, a factory is either a textile or a non-textile factory. A textile factory means any premises in which mechanical power is used to work machinery employed in manufacturing certain specified fibrous materials, or any fabric made thereof, with a proviso that certain works, e.g., paper mills or rope works, are not to be deemed textile factories. Nothing is said about the purpose, immediate or ulterior, of manufacture. Non-textile factories fall under three heads:—Head (*a*): Any works mentioned in Part I. of Schedule VI., which contains twenty items, generally described as places where persons work for hire in some process or manufacture. "Purposes" are only mentioned in one of these items, No. 20, which refers to the generation of electrical energy for the purpose of supply by way of trade, or for the lighting of certain specified places. This part of the Schedule contains "metal works," which form part of the use of the hereditament in *Stoke-on-Trent*

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Revenue Officer v. *Stoke-on-Trent Assessment Committee*, the *Potteries Electric Traction Co.'s Case* (1), and "printing works," which form part of the use of the hereditament in *Moon* v. *London County Council*, making the hereditaments in question statutory factories. The use of mechanical power is not made essential to those factories.

Head (*b*): Any premises mentioned in Part II. of the Sixth Schedule, in which mechanical power is used in aid of the manufacturing process carried on there. This part contains nine items, including "bakehouses," the subject of two decisions in the present group; and "shipbuilding yards," the subject-matter of *Union Lighterage Co.* v. *Barton*. The only references to "purpose" are that bakehouses are limited to those as to which a profit is derived from baking or selling; and that laundries are defined as those carried on for trade or gain or as ancillary to another business, or for the purposes of a public institution. The wording has something to do with the vexed question of inspection of convent laundries, which are not to be factories, and laundries attached to hotels, asylums, &c., which are to be factories if machinery is used, so that persons working in them are protected.

Head (*c*) covers a general clause from which the Divisional Court has obtained the language it uses. The clause is not a definition of "factories" but of those factories which have not been specially enumerated in Parts I. and II. of the Schedule. It is necessary in order to make such premises factories: (1.) that manual labour should be used in manufacture, including in that term adapting for sale, which falls to be considered in some of the cases in the present group; (2.) that mechanical power should be used in aid of the process of manufacture; (3.) that the labour should be exercised by way of trade or for purposes of gain.

It will be seen that the language is curious. One would think it is the workman who exercises manual labour: he certainly does it by way of trade or for purposes of gain, and it is the workman who is to be protected under the

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(1) 46 Times L. R. 434.

Factory Acts. It is odd that the employer should be spoken of as "exercising" the labour he employs, but it is apparently the trade or gain of the employer which is referred to.

Workshop is then similarly defined: (*a*) as places named in Part II. of the Sixth Schedule which are not factories, because mechanical power is not used. As to these there is no question of purpose. There follows: (*b*) a general clause similar to head (*c*) of the factory clause, requiring (1.) exercise of manual labour; (2.) in manufacture, as defined; (3.) for the purpose of trade or gain. It will be seen therefore that only in the unspecified class (*c*) does it become necessary to consider trade or gain at all.

It will be seen also that a definition originally used in the Act for the protection of workmen, and secondarily for the purpose of giving compensation for accidents to a workman employed about a factory, is now being employed as a definition of premises in respect of which the owner is entitled to relief from rates.

The Divisional Court appear to have taken the view that you do not manufacture "by way of trade or for purposes of gain" if you manufacture in order to carry on a business in which you do not sell goods, but in which you only obtain gain indirectly by the use of the goods you exercise labour upon. They apparently consider themselves bound to hold this by the decision of this Court in *Nash* v. *Hollinshead*. (1) In that case a workman on a farm driving a movable steam engine to grind meal for food for stock was injured and claimed compensation on the ground that he was employed in a factory—the only way in which he could under the Acts then in force recover it. He could of course now recover it under the present Acts; but he was held then not entitled to it, as he was not employed in a factory. The Court gave several reasons for this. The reason which commends itself most to me is that mentioned by Collins L.J. and A. L. Smith M.R., that the detailed provisions of the Factory Acts and the enumeration of specific factories show that the Legislature was not thinking of farming as a trade, of farms as non-textile factories, or of preparing food for your own stock as a "in the way of trade or for purposes of gain." A. L. Smith M.R. however thought that gain was limited to direct gain by sale, though Collins L.J. was not inclined to take this view. I cannot think however that where there is manufacture of articles to be employed in carrying on a trade, though that trade is one of supplying services for reward, as carriage by land or water, and not of supplying goods, the manufacture is not for purposes of trade, or that *Nash* v. *Hollinshead* (1) requires the Courts to hold otherwise. If there is a trade there is no need to consider "gain." The words "profits or gains of trade" have been used together in various connections for many years. In dealing with the Income Tax Acts Lord Cave L.C. in *Brighton College* v. *Marriott* (2) treated the surplus receipts of a corporation carrying on a trade for the benefit of a charity, if they were not "profits," at least as "gains." The Divisional Court in *Curtis* v. *Shinner* (3), where a fishing boat owner employed for reward labour to mend his nets, declined to hold the place of working a workshop, following *Nash* v. *Hollinshead* (1), on the ground that to repair nets for use in his own business was not "repairing for purposes of trade or gain." While *Nash* v. *Hollinshead* (1) may be justified as applicable to farming I see no reason to extend it to cases where labour is used in the manufacture of goods to enable a trade to be carried on which does not involve the sale of the goods. I think *Curtis* v. *Shinner* (3) was wrongly decided. It appears to me that a factory making printing machines would none the less be carried on for the purpose of trade because the machines were not made for purposes of themselves being sold but only to make things to be sold.

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(1) [1901] 1 K. B. 700.

Another question of some difficulty, perhaps involving a principle of construction, arises on Head (*c*), which converts places not specifically enumerated in Schedule VI. of the Factory Act, 1901, into "factories" or "workshops." It

(1) [1901] 1 K. B. 700.
(2) [1926] A. C. 192, 201.
(3) 95 L. T. 31.

arises on the words "alteration of an article" and "adapting for sale of an article" as connected with processes roughly described as "sorting." When a shopman is asked for a pound of bacon, and with a mechanical bacon cutter cuts a pound off from a side of bacon, or is asked for a yard of calico, and cuts it off from a roll, does he "adapt for sale"? On the other hand, where a trader by a most elaborate mechanical process sorts out from a mixed heap, cleans and performs other processes on a pound of seed, as in *Hines, Ipswich Revenue Officer* v. *Eastern Counties Farmers' Co-operative Association* (1); or where, being asked for 100 tons of scrap metal of a named size, he breaks up an obsolete ship into small pieces of the size required, as in *Langbaurgh Revenue Officer* v. *Langbaurgh Assessment Committee* (2) does he "adapt for sale"? If different decisions are arrived at in the two cases, what is the reason of the difference?

It must be borne in mind that if you exclude a hereditament from derating because there is no manufacturing process carried on in it, you are depriving the workmen of the protection of the Factory Acts, as well as the employer of the benefit of derating. It must also be borne in mind that in construing the Factory Acts, the Courts have given a wide meaning to the words. When in *Law* v. *Graham* (3) the Courts thought that mechanical bottle washing did not make a place a factory, the Legislature the same year put bottle washing into Part II. of the Sixth Schedule, making it a factory, if power were used. Putting chocolates into a decorated box, in *Fullers' Case* (4), and arranging flowers on a metal cross or circle to make a wreath, in *Hoare* v. *Robert Green, Ld.* (5), have been treated as "adapting for sale" to protect the workpeople employed in that occupation. In the present group of cases the Courts below have been disposed to exclude premises where the most complicated sorting has been carried on, even where some change in substance has been produced, from derating, and even from the Factory Act, 1901, on the ground that the process is not an adapting for sale. I think they ground this view on the decision in *Paterson* v. *Hunt* (1), which must therefore be closely examined. That case was a prosecution under s. 63 of the Factory Act, 1901, for employing young people in a factory, i.e., in a rag sorting room, without a certificate of fitness. To make the room a "factory," power must be used; and there was in another room a machine called a "shaker," which shook the rags to remove dust and dirt. It was only used on a very small proportion of the rags. The last time it was used was two months before the alleged offence, and then it was only in use for half an hour. Unless the premises were a "factory," there was no offence, for s. 63 of the Act of 1901 did not apply to a "workshop." It is not surprising that the prosecution failed. But the Court considered the question of adaptation for sale, and, treating the matter as one near the line, came to the conclusion that, in the words of Darling J., sorting blue rags from red rags, and thick rags from thin rags, was not adapting for sale.

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(1) 46 Times L. R. 512.
(2) 46 Times L. R. 508.
(3) [1901] 2 K. B. 327.
(4) [1901] 2 K. B. 209.
(5) [1907] 2 K. B 315.

In my view the question whether sorting or separation of an article to be sold from a bulk is an adapting for sale depends on the facts of each particular case, and cannot be determined simply by saying: "no sorting is adaptation for sale." The original bulk may be such that it cannot be sold either legally, as in mixed seeds, or commercially, because an unsorted bulk is not wanted, and the process of sorting may be so complicated and mechanical as to deserve the title of a manufacturing process, i.e., of "adapting for sale." On the other hand, the bulk and the article to be sold may be so similar and of such a nature, such as taking a quarter of a pound of bulls-eyes out of a bulk in a bottle, that the separation or sorting may well be regarded as an entirely minor incident of the sale or distribution. This view is indicated by Lord Sands in *Inland Revenue* v. *Maclachlans, Ld.* (2): "Primo loco, in considering whether premises fall within the definition of a factory or workshop, we have no concern with the complexity or the simplicity of the operation carried on, so long as that operation falls within the definition of adapting goods for sale, or, as the case may be under the statutory definition. The simplicity of the operation has no doubt been recognized as a factor where the question has arisen whether the operation is not just an incident in distributive wholesale business." Where substantial changes are made in the article, as in the seed-cleaning case, I see no difficulty in holding the process to be adapting for sale. But in view of the fact that "adapting for sale" is a separate head from altering, I see no reason for requiring alteration of substance to make "adapting for sale." If this were necessary, there would be no need to insert "adapting for sale." Where the process of separation or sorting is complicated and substantial, again I think there is adapting for sale. In many cases, it is a question of degree, which is in my view fact and not law, and not properly the subject of a Special Case. Further, the section in the Factory Act, 1901, deals with an "article," which I think means an article to be sold. A seed is never sold by itself commercially, and I think the article to be altered or adapted for sale is the article to be sold, i.e., a bulk, not an individual item which is never sold by itself. The bulk bought at one price is altered or adapted for sale into a bulk of a smaller size and different character which can be sold because of the alteration or adaptation at a much higher price. It is this principle which I think should be applied to the various cases involving sorting, which I consider separately.

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(1) 101 L. T. 571.

(2) 1930 S. C. 449, 452.

Before proceeding to deal with individual cases, in view of the large number of cases which we are told are awaiting decision, it may be desirable to give such guidance as we can to the Courts that have to deal with these cases in the first instance. This guidance can of course only be temporary, until the House of Lords has an opportunity of stating authoritatively and finally the principles on which this Act is to be applied :—

1. There must be on the hereditament, or part of it, a factory or workshop.

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2. So far as that factory or workshop is not specified in the two parts of Schedule VI., in the Factory Acts, it will be carried on "for trade or gain," if its products are to be sold in trade, or directly used in carrying on a trade. The fact that the products are only used to enable a trade to be carried on does not prevent the manufacture being for trade or gain. *Nash* v. *Hollinshead* (1) is sufficiently explained by its subject-matter, farming, and the reasons given relating to that industry, and cannot be used, as it has been used in *Bailey* v. *Stoke-on-Trent Assessment Committee*, the *Potteries Case*, to exclude from manufacture the repair of omnibuses for the purpose of carrying on a trade of supplying services.

3. Whether sorting operations can come within "manufacture" to make the premises a factory or workshop is a question of degree in each case, and *Paterson* v. *Hunt* (2) cannot be taken as excluding all sorting from the processes of adapting for sale, especially if there is some alteration of the bulk.

4. A hereditament with a factory on it will be excluded from derating, if the primary purpose and use of the hereditament is a non-factory purpose, but not unless this can be found.

5. In determining the primary purpose, the immediate and not the ulterior purpose is to be considered. It is not enough to exclude a hereditament from derating that a product made on the hereditament is to be sold or used for a non-factory purpose off the hereditament. This general statement is best illustrated by a decision in *Barton* v. *R. Twining & Co.* Finding the grinding, roasting, and blending of coffee berries to be a factory use, to which the hereditament was almost entirely devoted, we have not deprived it of derating, although the products of this factory were all to be sold outside the hereditament at shops of the owner of the hereditament.

I now proceed to deal with the application of these principles to each of the seventeen cases we have heard argued. But though I have carefully considered the facts of each case and the relevant English and Scotch authorities cited, I do not think it necessary to lengthen this judgment by setting out all the facts and considerations which have influenced me in the conclusions at which I have arrived, further than is necessary to show the reasons for those conclusions.

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(1) [1901] 1 K. B. 700.

(2) 101 L. T. 571.

BAILEY (REVENUE OFFICER) *v.* STOKE-ON-TRENT ASSESSMENT COMMITTEE AND POTTERIES ELECTRIC TRACTION COMPANY.

In my opinion the result of this case in the Divisional Court was correct, though I disagree with the reasoning by which that result was obtained. As these reasons are made the ground of subsequent decisions of the Divisional Court which in my opinion are erroneous, it is necessary to deal with them with some care.

The hereditament was owned and occupied by a company who were proprietors of a fleet of 198 motor omnibuses, thirty-six of which were garaged on the hereditament. The rest of it was occupied by a number of workshops used for repair of the omnibus fleet. Some workshops were metal works, which are a factory under Part I. of Schedule VI. of the Factory Act, 1901. Some were carpentering works, which, as mechanical power was used, became factories, if the labour was exercised for trade or gain. The Assessment Committee held the premises an industrial hereditament; the Recorder affirmed their decision. It was not found that the primary purpose of the hereditament was a specified or non-factory purpose. The Divisional Court held that the primary purpose for which the hereditament was occupied and used was a non-factory purpose, the running of motor omnibuses, and that any factory work done was only ancillary to that primary purpose; and they treated *Nash* v. *Hollinshead* (1) as binding them to decide that the repair work was not done for purposes of gain, because the gain was indirect. Why the repair work was not done for purposes of trade I do not understand. Trade in my view is not limited to the sale of goods, but extends to supplying of services for reward. As already stated, I do not think the ulterior purpose for which the goods are made, can prevent a factory from being derated. If therefore the only question in the case was stated in the Divisional Court I should hold the decision erroneous, and I think it has wrongly influenced the decision in some of the later cases, especially *Union Lighterage Co.* v. *Barton ; Moon* v. *London County Council ;* and *Eastern Counties Farmers' Co-operative Association* v. *Ipswich Revenue Officer.*

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(1) [1901] 1 K. B. 700.

But another point was raised in the Special Case which is not dealt with in the judgment. Sect. 3, sub-s. 2, of the Act of 1928, the Derating Act, provides that a place used by the Occupier for the housing or maintenance of his road vehicles shall not be deemed to form part of a factory or workshop. The language appears to me exactly to describe the use of the present hereditament. The making and fitting of spare parts and repair of vehicles seems to me an essential part of maintenance, even if that phrase also includes the daily oiling and adjusting that every vehicle requires, which it appears in the present case, have to be done on this hereditament, and which the learned Recorder describes as "ordinary maintenance." To "maintain" a vehicle you must keep its essential parts in fit condition, by replacing them if necessary, and to make a stock of spare parts and fit them when necessary, and repair any serious damage, seems to me as much "maintenance" as minor daily adjustments. It was argued that this sub-section only referred to vehicles actually used for the purposes of the hereditament, but I can see no ground in the language used for such a limitation.

In my opinion therefore the appeal should be dismissed, not for the reasons stated in the judgment, which I think erroneous, but because s. 3, sub-s. 2, of the Act prevents the hereditament from being derated. In view of this position I think the appeal should be dismissed without costs. (1)

UNION LIGHTERAGE COMPANY, LIMITED *v.* BARTON (REVENUE OFFICER).

The hereditament in this case was the barge yard of a large lighterage company owning some 500 barges. Ship repairing yards are in Part II. of Schedule VI. to the Act of 1901, and mechanical power was used in the yard. It is therefore a factory. No work was done in it for any one but the Lighterage Company. The Company exercised the trade of carriers by water for reward.

The Divisional Court having just held themselves bound in *Moon* v. *London County Council*, the case of a printing factory for tram tickets, and by the decision in *Bailey* v. *Stoke-on-Trent Assessment Committee*, the *Potteries Electric Traction Co.'s Case* (repair yard for omnibuses), this case was not argued, but treated as also decided by the *Potteries Electric Traction Co.'s Case;* that is to say that the primary purpose of this hereditament was to carry on a lighterage business, or was ancillary to that business, which in the opinion of the Divisional Court was not a factory purpose. For the reasons already stated I think the ulterior purpose must be disregarded. The only relevant use and purpose of the hereditament appears to be as a factory. This decision agrees with the unanimous decision of the Scotch Courts in *Inland Revenue* v. *Clan Line Steamers, Ld.* (2), relating to the repair yard of the Clan Line steamers.

This appeal must be allowed with costs here and below, and the hereditament restored to the Special List.

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(1) On December 15, 1930, this judgment was reversed in the House of Lords, save as to part of the hereditament used for the purpose of painting the omnibuses of the Occupiers. The ground of the decision was that the making of spare parts was not "maintenance" within the meaning of s. 3, sub-s. 2, of the Act. See [1931] A. C. 151.

(2) 1930 S. C. 445.

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MOON (Revenue Officer for Lambeth) *v.* LONDON COUNTY COUNCIL.

The hereditament in this case was used as to part, valued at 770*l.*, for industrial purposes—namely, as a printing establishment to print tickets for the County Council tramways, and as to the remainder, valued at 230*l.*, for non-industrial purposes—namely, statistical offices. Printing establishments are factories under Part I. of Schedule VI. of the Factory and Workshop Act, 1901. The Assessment Committee and Quarter Sessions put the hereditament in the Special List: the Divisional Court reversed their decision, holding themselves bound by *Bailey* v. *Stoke-on-Trent Assessment Committee*, the *Potteries Electric Traction Co.'s Case*, to look at the ulterior purpose of running trams as the primary purpose, and to hold that the factory purpose was only ancillary to that.

For the general reasons given already I think this decision was erroneous; that the ulterior purpose could not be looked at, and that the primary purpose and use of the hereditament was as a factory. Whether Parliament thought they were derating a factory for printing tickets I do not know, but the Court is not entitled to frame an equitable definition which will do what it thinks justice: it is confined to construing the words which Parliament has used, by which alone their intention must be judged.

The appeal must be allowed with costs here and below and the hereditament restored to the Special List. (1)

BARTON (Revenue Officer) *v.* R. TWINING AND COMPANY, LIMITED.

The hereditament in this case consists of a five-storey building, belonging to Messrs. Twining, the well known tea and coffee merchants. They bring to that building coffee beans, and by machinery roast them, grind them into coffee powder and blend the products. They pack the powder in tins and send the tins to their premises elsewhere for sale. The rest of the hereditament is occupied with the latter process, packing and forwarding. The Assessment Committee and Quarter Sessions put the premises in the Special List. The Divisional Court appear to treat the work done on the hereditament as a process of adapting the coffee beans for sale, but, if I understand them, say that as the coffee beans belong to Messrs. Twining and are subject to the process in question in order that Messrs. Twining may sell them, the primary purpose of the hereditament is wholesale or retail sale, and therefore it is not an industrial hereditament. They rely on their decision in the *Potteries Electric Traction Co.'s Case*, which I understand to be that goods manufactured not to be sold but to be used in a trade of supplying services, are manufactured primarily for a non-factory purpose. As far as I know Twining's is the only case where the fact that the Occupier manufactures his own goods to sell them elsewhere is held to prevent the manufacture from giving to the hereditament the character of an industrial hereditament. As has been already pointed out, this view of the Act would practically destroy derating, for almost every manufacturer manufactures in order to sell.

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(1) On December 15, 1930, this judgment was affirmed in the House of Lords. See [1931] A. C. 151.

I am quite unable to accept the view of the Divisional Court. In my view purposes must be confined to what is done on the hereditament itself, and not extended to the use that is to be made elsewhere of what is done on the hereditament. If you find on a hereditament, manufacture, selling, and storage being performed, the question is what is the primary use and purpose ; and unless you find that the primary or principal purpose or combination of purposes is non-factory, the manufacture makes the premises an industrial hereditament. In *Twining's* case you find the premises exclusively used for manufacture, i.e., altering and adapting for sale the coffee beans and sending them out to be sold elsewhere, not selling them there. As a matter of law you must find the premises an industrial hereditament ; as a matter of fact there is no justification for interfering with the decision of Quarter Sessions.

The appeal must be allowed with costs here and below and the decision of Quarter Sessions restored.

BANCROFT (REVENUE OFFICER) *v.* MANCHESTER ASSESSMENT COMMITTEE AND THE UNION COLD STORAGE COMPANY, LIMITED. (1)

The hereditament in this case was a large refrigerating stores, used to keep perishable goods at a temperature which would prevent their perishing by decomposition. The hereditament was omitted from the Special List; inserted therein by the Assessment Committee on appeal, but removed therefrom by the Divisional Court on further appeal on the ground that the primary purpose of the hereditament was "storage" within the proviso.

It was argued against this that in a cold store there was more than mere storage: there was a freezing, which was altering the goods, or adapting them for sale at a future time, which went beyond mere storage, and was the primary purpose of the hereditament. I doubt whether the process of storing the goods at a specified temperature other than that of the external air can be said to be either altering them, or adapting them for future sale. But in any event I find it impossible to believe that Parliament used the word "storage" without intending to cover in it the well known class of "cold stores." One reason for their so intending may be that "cold stores" are largely used to assist the sale of non-British products, and the benefit of derating was intended for British products.

I agree with the view of the Divisional Court in this case. The appeal must be dismissed with costs.

HINES (REVENUE OFFICER FOR IPSWICH) *v.* EASTERN COUNTIES FARMERS' CO-OPERATIVE ASSOCIATION, LIMITED.

PRITCHARD (REVENUE OFFICER FOR CARDIFF) *v.* WILLIAM LEWIS AND SONS.

Seed Merchants.

These two cases raise the question whether the very complicated and mechanical operations carried out by seed merchants to render the seed, which they purchase in a rough bulk containing a mass of other matter, fit for sale, are factory purposes, or merely parts of a distributive business in selling. The Seeds Act, 1920 (10 & 11 Geo. 5, c. 54), and the Regulations thereunder appended to the case contain elaborate provisions to secure the purity of seeds sold. The rough bulk as it comes to the seed merchant could not legally be sold to farmers because of the impurities it contains; and commercially certain changes are necessary in the substance. A series of elaborate mechanical operations are therefore performed to sort out the seeds to be sold and render them fit for sale. Some of these operations alter the substance. Oats must be clipped of their sharp points; some seeds must be decorticated, or the husks removed; some hard seeds must be broken so that they may germinate. These operations, involving an alteration of the articles to be sold, as well as an adaptation for sale, seem to me clearly for factory processes. But, in addition, the seeds to be sold must be sorted out from the weeds. The original bulk is unsaleable to farmers legally and commercially; it must be converted into a smaller bulk, not of one seed, but of collections of seeds. This is done by mechanical operations of the most complicated character, that for extracting the dodder seed from red clover being particularly ingenious.

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(1) The judgment in this case was affirmed in the House of Lords on March 6, 1931.

The hereditament in the *Ipswich* case is used exclusively for treating and preparing seeds for sale, the sale and distribution being carried out on other premises which have not been derated.

In *Pritchard, Revenue Officer for Cardiff* v. *William Lewis & Sons* there is a retail shop in the front of the premises facing an important street, and the warehouses at the back are used for the seed cleaning processes. Here the hereditament has been apportioned; the shop as non-industrial, the warehouse as industrial. The Assessment Committees put both hereditaments in the Special List. On appeals under Baines' Act, the Divisional Court removed both hereditaments from the Special List, but the judges proceeded on different grounds. Avory J. thought the processes described did not amount to

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an adapting for sale, but that if they did, the primary purpose was yet wholesale distributive business. Talbot J., treating the case as one of great difficulty, was of opinion that there was an adapting for sale, but that yet the primary purpose was a wholesale distributive business. Finlay J., also considering the case one of great difficulty, thought there was no adapting for sale, but that if there had been, he would not have been able to hold the primary purpose was a wholesale distributive business. I think this is the effect of his judgment as reported, though I doubt whether the note we have correctly represents what he said. In my view, there was both alteration of substance and adapting for sale in sorting, making a substantially different article in bulk from that which existed before the processes were applied. In my opinion, you cannot deal with the case by saying there was a seed before the process and the same seed after the process. The process has altered the bulk and made it legally and commercially saleable. The process being therefore a factory process, for the reasons already given I do not think its purpose can be displaced by saying the process is carried out for the ultimate or ulterior purpose of wholesale distribution. This, as already said, would destroy all derating.

With regard to the retail shop in the front of the hereditament, I think on the facts stated the primary purpose of the hereditament was not a process of sale, but a process of manufacture. The purposes have been apportioned under s. 4. The Scotch cases have varied in their result. In *Inland Revenue* v. *John Donaldson & Co.* (1) (seed cleaning), an early case, Lords Hunter and Fleming treated the premises as primarily used for distribution or storage, to which cleaning was only incidental. Lord Sands treated them as primarily used for storage, and would not commit himself on the question of wholesale distributive business. But in three cases decided later (*Inland Revenue* v. *Aberdeen Commercial Co.* and *Inland Revenue* v. *Hutcheon* (2)), while Lord Hunter adhered to his original opinion, Lords Sands and Fleming held that on the facts stated there was an alteration in the article sold, and therefore an industrial process, and that this was the primary purpose, though distribution wholesale followed. Later, in *Inland Revenue* v. *McGill* (1), of which we were supplied with a print, Lord Sands, being unable to find a change in the substance of individual seeds, and having regard to the fact that his opinion in *Inland Revenue* v. *Easson Brothers* (2), referred to by him as *Rankine*, that a change in bulk would do, was dissented from by the majority, followed *Inland Revenue* v. *John Donaldson & Co.* (3), both he and Lord Fleming stating that the distinctions were very narrow. No doubt these cases will turn on the particular facts in each case. I myself should not have decided *Donaldson's* (3) and *McGill's* (1) cases in the way in which they were decided in Scotland. But on the facts in the present case, for the reasons given, I think the Divisional Court came to wrong conclusions. The appeals must be allowed with costs here and below and the hereditaments restored to the Special List. (4)

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(1) 1930 S. C. 348.

(2) 1930 S. C. 555.

WEATHERHEAD (REVENUE OFFICER FOR BRADFORD) v. BRADFORD ASSESSMENT COMMITTEE AND MESSRS. LAYCOCK, SON AND COMPANY.

Wool Sorters.

This case relates to a process in the woollen trade. Fleeces shorn from the sheep come to woolbrokers, who sort them into kinds and qualities and deliver them as independent fleeces to Messrs. Laycock. On the hereditament in question the fleeces are then pulled to pieces and the wool in each fleece sorted according to qualities, and the various qualities are combined with wool from other fleeces so as to get a bundle of material of one of the standard qualities contained in a " sheet " and known as a " matching." The identity of the original fleece is gone; a " matching " of a standard quality appears. It is obvious from the case that this process requires great manual and technical skill and experience. Messrs. Laycock then dispatch the " matchings " to another firm to convert into " tops," which will then be sold by Messrs. Laycock for spinning.

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(1) Unreported.
(2) 1930 S. C. 480.
(3) 1930 S. C. 348.

(4) The decision in *Hines*' case was affirmed in the House of Lords on March 6, 1931, see [1931] W. N. 75.

The Assessment Committee and the Recorder on appeal included the hereditament in the Special List. The Divisional Court expunged it on the ground that this was merely sorting and not making or adapting an article for sale, and the primary purpose was wholesale distribution. Talbot J. however hesitated, as he thought this view of the application of the Factory Acts to the facts of the case might be " inconvenient in practice." His hesitation was justified. Unfortunately the Divisional Court were not told that the sorting of some wools involved the serious danger of anthrax to the workmen, and that therefore the Home Secretary had under s. 78 of the Factory Act, 1901 (prohibition of taking meals in factories), and s. 79 (regulations for dangerous trades) made special orders and regulations declaring wool sorting to be a subject of the sections, and regulating it, which orders were, if the decision of the Divisional Court is correct, ultra vires, and afforded the workmen no protection against anthrax. Apart from this, it appears to me that the " matching " which leaves the hereditament is a substantially different article from the various fleeces which entered it. Each hair is no doubt the same, but one does not buy single hairs; one buys " matchings," which are made out of, but different from, fleeces. That the process is for the purpose of ultimate wholesale distribution appears to me for the reasons already stated immaterial. The primary purpose of the hereditament is the factory purpose of making " matchings," a different article from the fleeces out of which " matchings " are made.

In my opinion the appeal should be allowed with costs, and the hereditament restored to the Special List.

PICKIN (REVENUE OFFICER FOR LANGBAURGH) *v.* LANGBAURGH ASSESSMENT COMMITTEE AND MESSRS. ROBERT CHEYNE AND COMPANY, LIMITED.

LOFTHOUSE (REVENUE OFFICER FOR LANGBAURGH) *v.* LANGBAURGH ASSESSMENT COMMITTEE AND MESSRS. A. BAINBRIDGE, LIMITED.

These cases raise substantially the same point. The hereditament is used by traders in scrap metal who buy disused and obsolete machinery, boilers, ships, propellers and the like, which are largely used, if treated in a particular way, as the raw material for furnaces of iron and steel manufacturers. To be so used, the original metal must be broken up in pieces suitable for the size of the chargers to the furnaces, about 5 feet by 1½ feet by 2½ feet. This is done by mechanical processes, oxy-acetylene plant, and cranes for dropping heavy weights on the metal to be broken.

The Assessment Committee, Quarter Sessions and Divisional Court all held this was a manufacturing process, and that the hereditament must be derated. The Divisional Court took the view that as a matter of law, it being a question of degree, it was impossible to say the Quarter Sessions were wrong in saying what was done was the purposes of a factory or workshop. I agree with them, but as they doubted what they would themselves have decided, I go further and say that I should myself have decided the same way. The argument of the Revenue Officer was that when the applicants bought the metal it was scrap; when they sold it it was scrap; the only difference was the size of the pieces, and cutting into pieces was not adapting for sale any more than cutting a yard of calico off a roll was adapting for sale. I think the first fallacy here was in talking of the original purchase as a purchase of scrap. The obsolete ship or the old boiler are not "scrap," except in the sense that they are going to be scrapped, or broken into scrap. In their then state the foundry wanting 500 tons of scrap would not buy the ship. The applicants' processes of breaking up render the ship saleable as scrap at a higher price than was paid for it originally.

The Scottish Courts in *Brown, Macfarlane & Co.* v. *Inland Revenue* (1) by a majority have come to the same decision. Lord Hunter in his dissenting judgment follows *Paterson* v. *Hunt* (2), which seems to me an entirely different case in fact, and also says the purpose is distributive but not a factory purpose, which is the point about immediate and ulterior purpose already dealt with.

The appeals must be dismissed with costs.

HERBERT KAYE (REVENUE OFFICER FOR DEWSBURY) *v.* DEWSBURY ASSESSMENT COMMITTEE AND ERNEST BURROWS.

Rag Sorting.

In this case the hereditament was occupied for the purpose of performing a process of sorting a bulk of old clothes and rags, and fresh tailor's cuttings to produce various selections of rags, etc., for sale to manufacturers of shoddy and mungo cloth. The process is one which does not involve machinery; some alteration of the original bulk is produced, as old garments and rags are torn to pieces, or disintegrated into their separate materials, cotton stripes are cut out of woollen materials, and darns out of socks. But the bulk of the process is a very complicated sorting. Nearly 300 different kinds of fibrous material are sorted to be sold separately, and, in cases where coloured fabric is required, are blended or mixed to produce the necessary effect. The sorted results are sold, where the original bulk could not be sold.

The Assessment Committee derated; the Quarter Sessions by a majority reversed them, holding that the business in th hereditament was primarily a distributive wholesale business. The Divisional Court took the view that they could not as a matter of law say the Quarter Sessions were wrong, though Talbot J. would, I gather, have found the other way. I cannot agree with the Divisional Court. There is very little evidence what amount of actual selling, as distinguished from adapting for sale, is done in the hereditament. A great deal of the storage found appears to be ancillary or incidental to the sorting, which, as a large number of fibrous materials have to be taken out and sorted, requires several operations, with temporary storage between the operations. Fifty-six women sorters are employed, who are required to be highly skilled. The Quarter Sessions appear, erroneously in my opinion, to have directed their attention to what is going to take place after the rags are sorted and leave the factory, instead of what is being done on the hereditament itself, the purpose for which the hereditament is being used. If the proper direction to themselves is given, there is in my opinion no evidence on which the tribunal can find that the primary purpose for which the hereditament is used is non-factory. As to adapting for sale, the case falls in line with the sorting cases already dealt with. In *Paterson* v. *Hunt* (1) there was not sufficient use of machinery to make the place a factory ; the remarks as to adapting for sale must depend on the particular facts of that case, and do not decide any of the complicated facts in the cases before us. I entirely agree on this point with the minority judgment of Lord Sands in *Inland Revenue* v. *Easson Brothers*. (2)

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(1) 1930 S. C. 468.

(2) 101 L. T. 571.

[This judgment was affirmed in the House of Lords on March 6, 1931, see [1931] W. N. 74.]

REVENUE OFFICER FOR WIMBLEDON *v.* KERSLAKE.
REVENUE OFFICER FOR LUTON *v.* DEELEY.

Bakehouse and Shop.

These cases are test cases to determine the position of a hereditament in which there is a bakery and a retail shop in which some or all of the products of the bakery are sold, and are important, because so far the English Divisional Court has taken a directly opposite view to the decision of the majority of the Scotch Land Valuation Court, as contained

(1) 101 L. T. 571.

(2) 1930 S. C. 480.

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in the four cases *Inland Revenue* v. *Malcolm*, *Irving*, *Lawrence* and *McLeay* (1) following the principles laid down by the majority of the Court (Lord Sands and Lord Fleming) in *Inland Revenue* v. *Gunn, Collie & Topping* (2), a case of a tailor's workshops and a tailor's shop. The facts of the two English cases are substantially similar. On each hereditament there is a large bakery, the products of which are either actually sold in a shop on the hereditament, or sent out direct from the bakery by roundsmen to fulfil orders they have taken direct from customers. The latter sales are by far the most numerous and financially important. I have no doubt, though the case does not mention it, that the latter orders are booked at the shop, and bills sent out from the shop. There is also a dwelling-house on the premises for the owner or manager. The Assessment Committee in each case derated the hereditament. In *Kerslake's* case they apportioned the value as 27*l.* industrial and 138*l.* non-industrial. The latter higher value was due to the fact that the shop had a frontage to High Street, Wimbledon.

The Divisional Court took the view that the primary purpose of the hereditament was a combination of a retail shop and dwelling-house. There is no finding in the case of this, if it is a question of fact; obviously the parties stating the case could not agree on it. I do not see how it can be a question of law, unless the view taken by the Divisional Court is right that you may look outside the hereditament to see what use is to be made of the manufactured product, and, if it is made for sale, may treat that as the primary purpose. This, as I have said, would deprive almost every factory of derating. If it is said in this case the shop is on the premises, I yet do not see how it is possible to say whether the purpose of making, or the purpose of selling is primary. I refer to the reasoning of Lord Sands in *Inland Revenue* v. *Gunn, Collie & Topping* (3), with which I agree. Later, in *Inland Revenue* v. *Assessor for Wigtownshire* (4), he goes

(1) 1930 S. C. 437; 1930 Sc. L. T. 292.

(2) 1930 S. C. 389.

(3) 1930 S. C. 389, 395.

(4) 1930 S. C. 543, 547.

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further, and says: "The bakehouse is vital. The whole fabric, dwelling-house and retail shop, depend upon the bakehouse, and therefore I am unable to hold that, as in contrast with the baking of bread, either retail sale or residence is primary." It is not necessary to go as far as this in order to allow the appeal in this case. In my view the Assessment Committee having found the hereditament industrial, and there being no finding of fact in the case as to primary purpose, there is no ground in law from which one can say that the sale is more important than the making. In an Act intended to benefit producers it would be curious if the Legislature said to the producer: "But if you sell your product you shall not be benefited; to get your benefit, produce, but do not sell." If the *Stoke-on-Trent Assessment* case, the *Potteries Electric Traction Co.'s* case, is decided on correct reasoning, as I think it is not, this is accompanied by a statement, "If you do not sell the product, but use it to assist a trade you are carrying on, you will also lose your benefit."

In my opinion both these appeals should be allowed with costs, and the hereditaments restored to the Special List. (1)

TURPIN (REVENUE OFFICER FOR MIDDLESBROUGH) *v.* BAILEY.

KAYE (REVENUE OFFICER FOR BARNSLEY) *v.* EYRE BROTHERS, LIMITED.

Repairs at Garage.

These two cases are intended to test the position of garages which do extensive repairs. I do not think it is possible to lay down any rule which will apply to all garages, as one of the points to be decided, in my view, depends on the facts in each particular case.

In the case of Kaye, Revenue Officer for Barnsley, Messrs. Eyre, whose business has grown very rapidly, have split their business among five hereditaments. The hereditament in question was used for their repair work, which accounted for over 90 per cent. of the work on the premises. There were two petrol pumps, but it was admitted these were only used for vehicles which had come in for repair. The premises being hidden away from the streets, a passing motorist would not call for petrol. The Assessment Committee having placed the hereditament in the Special List, the Quarter Sessions removed it on the ground that the premises were primarily occupied and used as a retail shop. A " retail shop " is defined in the Act of 1928 as including " any premises of a similar character, where retail trade or business including repair work is carried on." I do not think this means that any place where repair work is done for an individual is a retail shop. It is sufficient to test this by asking whether a shipbuilding yard where ships are brought for repairs is a " retail shop." I do not think any persons using ordinary English would so describe it, and I decline to believe that Parliament intended such a result. On the other hand, a cobbler's workshop where boots are repaired appears to me the sort of thing covered by the definition. To talk of a place where cars, whose value may run up to a thousand pounds, have repairs done to them which may run into hundreds as a " retail shop " seems to me a wrong and unlikely use of language. The majority of the Divisional Court took a similar view to this and have stated their reasons fully, and I agree with the result at which they arrive.

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(1) The judgment in *Kerslake's* case was reversed in the House of Lords on March 6, 1931, see [1931] W. N. 75.

A further and different point may however arise in " garage cases." If you get a hereditament on which cars are garaged, petrol and accessories are sold, some repairs are done, and possibly the owner or manager lives, a question of degree may arise whether the primary purposes for which the garage is used are not a combination of non-factory purposes. This will depend on the relative user for the various purposes, and in many cases may be a question of degree, not the subject of appeal by Special Case. This seems to me to be the position of *Turpin* (*Revenue Officer*) v. *Middlesbrough Assessment Committee*. A plan was produced showing the construction of the hereditament. Part of it was used for extensive repairs; some five cars were garaged; some petrol and accessories were sold; there was practically no sale of cars; and it is found as a fact that much the larger part of the premises and practically the whole time of the proprietor and his employees is devoted to repair work. The Assessment Committee derated, and the Recorder affirmed their decision, holding that the premises were not a retail shop, and that the primary purpose for which the premises were used was repair work. The majority of the Divisional Court affirmed this decision. I agree with their view as to "retail shop"; with regard to the finding of primary purpose it is enough to say that this seems a question of degree upon which there is no appeal by Special Case. It is impossible to say as a matter of law that the Court must find the primary purpose of such a hereditament is non-factory.

The appeals in these two cases must be dismissed with costs. (1)

SEDGWICK (REVENUE OFFICER FOR CAMBERWELL) v. CAMBERWELL ASSESSMENT COMMITTEE AND WATNEY, COMBE, REID AND COMPANY, LIMITED.

Bottled Beer.

In this case the real question is whether carbonizing, maturing, and bottling beer is all a manufacturing process, in which case I think it is impossible to say that the Assessment Committee erred in putting the hereditament into the Special List, there not being sufficient use of the hereditament for non-factory purposes; or whether the bottling part of the process is merely a distributing and not a manufacturing process. Very extensive machinery is used in the hereditament for bottle washing and for bottling. Bottle washing works are included in the list of Factories and Workshops in the second part of the Sixth Schedule to the Act of 1901.

I have come to the conclusion on the facts stated that the carbonization, and bottling in bottles washed by machinery

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(1) The judgments in these two cases were reversed in the House of Lords on March 6, 1931, see [1931] W. N. 74.

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is a factory process in manufacturing bottled beer. When one asks for bottled beer one does not expect to get draught beer in a bottle; and one would be much annoyed to get in a bottle the beer as it comes into this hereditament. One expects beer that is not flat, but with a certain amount of gaseous content. This is obtained by the carbonization carried on in the hereditament, and by securing the carbonized and matured beer in bottles to preserve its character. The result is a special product, "bottled beer" as distinguished from draught beer, a distinction which does not turn on the fact that the beer is in a bottle, but on the different nature of the liquid in the bottle from draught beer, the bottle being used to preserve that different character. If carbonizing, bottle washing, and bottling are factory purposes, then I think there is no doubt on the facts that the hereditament is not primarily used for non-factory purposes, the purposes and use being confined to the immediate use and purpose of the hereditament itself and not to the ulterior use which will be made outside the hereditament of the product of the factory itself. The hereditament therefore should be placed in the Special List and the appeal allowed with costs here and below. I am surprised that the result of the Derating Act should be to benefit breweries, one of the few industries which appear to be prosperous at the present time, but one can only attempt to construe the words Parliament has used to define the objects of their benevolence at the expense of the taxpayer. If the results of that definition startle the Legislature, they can frame a more careful definition to express their precise intentions, if they had any precise intentions. (1)

REVENUE OFFICER FOR DUDLEY v. LLOYDS BRITISH TESTING COMPANY, LIMITED.

Chain Cables.

I have personally found this case the most difficult of the seventeen cases considered. The Assessment Committee put the case in the Special List; the Recorder took it out as a non-industrial hereditament; the Divisional Court by a majority affirmed him. And I may add this Court is divided in this and only this case.

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(1) This judgment was affirmed in the House of Lords on March 6, 1931, see [1931] W. N. 73.

It is necessary to follow the facts carefully. By the Anchors and Chain Cables Act, 1899, chain cables cannot be sold to British ships unless tested and proved by authorities independent of the manufacturer, of whom the Committee of Lloyds Register of British and Foreign Shipping for testing establishments is one. The manufacturer sends into the office a length of cable manufactured by him rather longer than the length of cable he wants to sell. Lloyds British Testing Company cut out of the cable five links, three of which will be whole, the end two being cut out to detach them from the cable. The three whole links are then tested to a breaking strain. If they stand the test, no further test for breaking strain is imposed, but the two parts of the cable are joined by one new link made at Lloyds. So far it seems to me there is no alteration or adapting for sale, only testing to see whether the article is fit for sale. The small manufacture of one link is merely ancillary to the testing. If however the three links break, another length of five links is cut out and the process repeated. If the second set of links break, the cable is rejected. I doubt whether this result can be called "adapting for sale." If the second set of links do not break, the cable is joined again with one link, and proceeds to its next test of tensile strain. In this test the links alter their shape, not in any way improving the cable, but as the result of testing. Workmen then examine each link to see whether it is defective, and scale it and dip the cable in tar as a finishing process. Some manufacturing work is undoubtedly done, but it seems to me small and ancillary to the process of testing, or seeing whether the cable is fit for sale. If the testing office rejected all cables, I do not think its work could be described as a manufacturing process; the cables it passes are, I think, not adapted for sale, but tested to see if they are fit for sale. I have come to the conclusion therefore with some hesitation, especially as this is the only one of the seventeen cases in which the Court is not unanimous, that the Recorder and the majority of the Divisional Court took the correct view of the case, and that the appeal should be dismissed with costs.

It will be seen that in the majority of cases we are differing from the views of the Divisional Court, but the difference generally arises from different views taken of a few questions of principle, especially (1.) whether the purpose to be considered is the immediate or the ulterior purpose, on which question we generally agree with the majority in the Scotch Court, and the Divisional Court with Lord Hunter; (2.) as to the cases in which modern sorting is or is not adaptation for sale; and (3.) as to the effect to be given to the oft quoted cases of *Nash* v. *Hollinshead* (1) and *Paterson* v. *Hunt.* (2) The House of Lords will express a final view.

I cannot conclude without expressing the obligation of the Court to the various counsel who have assisted us in the consideration of this difficult Act, and especially to the counsel for the Revenue Officers who have been concerned in all the seventeen cases we have heard. (3)

Greer L.J. Before I had the opportunity of reading the judgment of Scrutton L.J. I had written a long judgment of my own stating in the first place in a general way the opinion I had formed on the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, so far as it was necessary to interpret that section for the purpose of deciding the seventeen appeals before us, and in the second place my decision on each of the appeals. After reading the judgment of Scrutton L.J. I find myself almost in complete agreement with everything contained therein. The Lord Justice has put into language, which I cannot pretend to improve upon, my views on the relevant questions on which our decision in these cases turns, and I think no useful purpose will be served by stating my opinion in words different from those used by him. With one exception I agree with his decision of these appeals. I have therefore very little to add.

(1) [1901] 1 K. B. 700.

(2) 101 L. T. 571.

(3) This dissenting judgment of Scrutton L.J. was affirmed in the House of Lords on March 6, 1931, see [1931] W. N. 73.

It is necessary for me to say however that I differ from his decision in the case of *The Revenue Officer for the Dudley Assessment Area* v. *Lloyds British Testing Co., Ld.*, and to state my reasons for so differing. I also think it advisable to put in my own words my views on the subject of onus of proof.

With reference to the onus of proof, the following considerations appear to me to be well founded. Sect. 3 defines "industrial hereditament" as meaning (inter alia) a hereditament occupied and used, subject as thereinafter provided, as "a factory or workshop," and then provides that the expression does not include a hereditament primarily occupied and used for certain purposes therein enumerated.

A question discussed during the argument in some of these appeals is whether, if it be established by the ratepayer that his hereditament is occupied and used as a factory or workshop, that would entitle his claim to be derated to succeed unless the Revenue Officer established by way of answer that the hereditament was primarily occupied and used for some of the purposes mentioned in the latter part of the section. In my judgment this argument ought not to prevail.

To put the case figuratively, I think that if a privileged class is defined by the symbols x-y, the person claiming to be a member of the privileged class must show that he is within the compound description x-y. It is not sufficient for him to show that he is within the description x. An industrial hereditament is not defined merely as a hereditament occupied and used as a factory or workshop, but is defined as a hereditament occupied and used as a factory or workshop subject to the proviso, that is to say, a factory or workshop not primarily occupied for the purposes described in the sub-ss. (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), and I think also 2 (*a*), and (*b*). The excluding words are just as much part of the definition as the including words. The definition of "industrial hereditament" does not take the form of describing the hereditament as one which is used and occupied as a factory or workshop within the meaning of the Factory and Workshop Acts followed by some other section entitling the Crown to say "though

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the hereditament is within the words of the definition, we are entitled to prove facts which bring it within the exceptions enacted in this other section." The definition itself is a definition which means under the term "industrial hereditaments" not all factories, but a limited number of factories which conform to the affirmative words of sub-s. 1, and the negative words of the proviso subject to which the affirmative words are stated to apply.

It follows that a claimant to relief does not show a title to relief unless he shows that his hereditament is one of the limited class of factories defined by the whole of s. 3. I am not sure that our decision in any of the appeals which this Court has had to consider turns on onus of proof, but it is a question of great importance to the tribunals of first instance which deal with these matters, and I have thought it right to express an opinion on the question for their guidance.

The view thus expressed is in accordance with the decisions in *Rex* v. *James* (1) and *Steel* v. *Smith.* (2) In *Rex* v. *James* (3) Lord Alverstone summarized the decisions on the subject of the onus of proof where an offence is defined with an exception or proviso excluding certain facts from the definition. He used these words (3): "We think the substance of the authorities is this: That it is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception." I think this principle applies to the construction of s. 3 of the Rating and Valuation Act, 1928. In that section the defining clause cannot be read without the qualification introduced by the proviso, because the words of the definition are expressly made "subject to the proviso."

When an appeal is brought to Quarter Sessions no doubt, as Scrutton L.J. has said, the question in the appeal is whether the decision of the Assessment Committee is wrong, but it ought to be noted that the Court of Quarter Sessions is not concerned with the facts found by the Committee. The Court of Quarter Sessions must try and decide the questions involved on the facts proved before the Court itself, which may be entirely different from those found by the Assessment Committee. In the same way when a case is stated under Baines's Act the High Court must determine the appeal on the basis of the facts stated in the case without regard to any facts that may have been involved in the decision of the Assessment Committee.

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(1) [1902] 1 K. B. 540.
(2) (1817) 1 B. & Ald. 94.
(3) [1902] 1 K. B. 540, 545.

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In this case the Divisional Court decided that Lloyds British Testing Company were not entitled to have their premises put in the Special List. The operations performed on the premises of the Testing Company cannot be carried out without a physical alteration and reconstruction of the chain cables and the anchors. These operations are necessary before the cables and anchors can be sold in the market in which the makers want to sell them. They seem to me to come within the express words of s. 149, sub-s. 1 (*c*), of the Factory and Workshop Act, 1901, as the " adapting for sale " of an article. They are part of the processes carried out in the production of a saleable commodity, and not part of the processes of wholesale distribution by a merchant. In the testing work the commodities are altered, finished and adapted for sale.

I find it impossible to hold that a factory in which machinery is used for cutting iron or steel cables, and where links are forged and replaced, is not a factory within the Factory and Workshop Act, 1901. On the principles laid down in the judgment of Scrutton L.J., with which I entirely agree, I find it equally impossible to hold that the primary purposes of this testing house are other than factory purposes. The making of goods fit to be lawfully sold is the immediate

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purpose for which the hereditament is occupied and used. This appeal should, in my judgment, be allowed with costs here and below.

I only desire to add that in coming to my conclusions on the questions involved in the various cases I have been greatly assisted by the vigorous judgments of Lord Sands in the Scottish cases, whether those judgments were, or were not, in agreement with the majority. In the case of the *Inland Revenue* v. *Clan Line Steamers, Ld.* (1), he said: "I am quite unable to read the proviso as if it read 'if they are occupied and used for some ulterior purpose other than the sale of the goods manufactured.'" I agree.

In the case of *Inland Revenue* v. *Easson Brothers* (2), a case where the business of sorting rags and paper was carried on, Lord Sands says: "On the counter emptied out of collecting carts there is a huge amorphous mass of waste paper, rags, etc., mixed with dirt and rubbish, which no paper manufacturer would look at. The workers produce a number of orderly bales in eighty different classes, which the papermakers readily buy for substantial sums. Can it reasonably be said that there has been no adaptation for sale of the mass of material which was emptied out of the carts, and which, so far as not discarded as dirt or rubbish, is now arranged in orderly merchantable bales? I understand the argument to be that, if you look at one particular rag or one particular scrap of paper, that rag or that scrap of paper has not been subjected to any treatment which alters it or adapts it for sale. As it appears to me, this is an altogether artificial and superficial argument. The papermaker is not buying one rag or one piece of waste paper; he is buying a bale. If what had happened was that the papermaker had come into the premises saying 'I want a blue cotton rag' or 'a piece of brown paper,' I could understand the argument that there had been no adaptation of the particular article for sale. All that had been done was to arrange the articles so as to avoid the trouble of having to rummage through the heap whenever

(1) 1930 S. C. 445, 448.

(2) 1930 Sc. L. T. 263, 266; 1930 S. C. 480, 485.

a papermaker comes in and asks for something. But that is not the condition of the problem. If one regards the whole mixed mass that comes into the works, that mass has been adapted for sale, or made saleable, by laborious assortment." I entirely agree with those observations. Considerations such as those mentioned by Lord Sands seem to me decisive of *Weatherhead (Revenue Officer)* v. *Bradford Assessment Committee*, the Bradford Wool matchings case; *Eastern Counties Farmers' Co-operative Association* v. *Ipswich Revenue Officer* and *Lewis & Sons* v. *Cardiff Revenue Officer*, the seed factory cases; of *Kaye* v. *Burrows*, the case of the wool sorting factory; and *Lofthouse & Pickin* v. *Langbaurgh Assessment Committee*, the case of the scrap metal works.

As I have said, I agree with the result arrived at by Scrutton L.J. in all cases except *Dudley Revenue Officer* v. *Lloyds British Testing Co.*, and think it unnecessary to encumber the pages of the Law Reports with verbal variations of his judgment.

SLESSER L.J. I have read with care the exhaustive judgment of Scrutton L.J. in these cases, and find myself so entirely in agreement with him in every particular, both as to the principles of interpretation which he lays down and as to the conclusions at which he arrives in each case that, with the exception of one judgment of the Divisional Court, I do not find it necessary in any way to qualify what he has decided.

In so far as any difference of opinion may be detected by some astute person between my brothers on the question of onus of proof, for the sake of clarity I would say that I exactly agree with Scrutton L.J.

The only case in which I differ from my Lord is that of *Dudley Revenue Officer* v. *Lloyds British Testing Co.* This case depends upon the answer to the question whether the work on the hereditament is an "adapting for sale" within the meaning of s. 149 of the Factory and Workshop Act, 1901. The material facts of this case have already been mentioned by Scrutton L.J. The appellants occupy and use their hereditament for testing, proving and finishing chains,

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cables and anchors which are sent to them in order to comply with the requirements of the Anchors and Chain Cables Act, 1899, and the regulations made thereunder. This Act, by s. 1, restricts the sale of chain cables or anchors of the kind specified therein unless the same have been previously proved in accordance with the Act. The process which chain cable has to undergo is set out in the Case, which is a Case stated by the Recorder of the Dudley Quarter Sessions, and in effect requires that, in every case of testing, certain links be cut out of the chain cable as sent to them and, if the sample piece satisfactorily withstands the breaking strain, the severed parts of the cable length are joined together by a welded link formed and welded at a forge on the premises by the employees of the Company. Other processes may be necessary where the cable proves defective. It is argued for the Crown that the process here carried on is done for the purpose of testing and not for the purpose of adapting for sale. To negative the latter purpose would have the effect of preventing the hereditament being a factory, so that s. 3 of the 1928 Act would not apply to it and it would not be an industrial hereditament.

The Divisional Court, who, in accordance with their teleological interpretation of purpose, look to the ultimate purpose carried on, have decided by a majority that the primary purpose of the hereditament is that of carrying out tests. Their task, to quote the Lord Chief Justice, "is not to adapt the cables for sale, but to see that they have been so adapted." Branson J. agreed with him in supporting the opinion of the Recorder that the primary purpose of the hereditament was not a factory purpose, because it was a testing purpose which is not an adapting for sale, and the appeal from the Recorder to the Divisional Court was consequently dismissed. Avory J., dissenting, took the view that the hereditament was primarily occupied and used for the purposes of finishing and adapting for sale the chain cables and anchors. It is not very clear from the finding of the Recorder, upon what ground he held that the hereditament was not an industrial hereditament; whether he did

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so on the ground that it was not a factory at all or on the ground that though it was used and occupied as a factory or workshop, that was not its primary purpose. In my judgment, in so far as the whole hereditament was occupied and used for the testing of cables, the question of primary purpose in the proviso does not really arise; either the hereditament is a factory or it is not, and, if the appeal is to be dismissed it must be dismissed on the ground that there being here no adapting for sale, the whole hereditament is not occupied and used as a factory.

In my opinion, however, it is an undue restriction of the language of s. 149 of the Factory and Workshop Act, 1901, to say that this hereditament is not a factory. I think that the words "adapting for sale" are to be given a liberal construction, coming as they do as words of increasing generality after the words "altering, repairing, ornamenting or finishing"; and, having regard to the mischiefs to which the Factory Acts were directed as to the health and safety of the workers therein, though there is no direct authority on the subject, I am prepared to hold that, where an article cannot be sold by law until certain physical processes are performed upon it, the performance of those processes may at least be part of the adapting for sale.

Although there are certain specific named types of factory mentioned in the Sixth Schedule to the Factory and Workshop Act, 1901, the hereditament here under consideration can only be a factory because it falls within the definition contained in s. 149, which is as follows: "any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—(i.) the making of any article or part of any article; or (ii.) the altering, repairing, ornamenting or finishing of any article; or (iii.) the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water or other mechanical power is used in aid of the manufacturing process carried on there." It is to be observed, as I have said, that the words "adapting for sale" follow

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words of more limited connotation—namely, the "altering, repairing, ornamenting or finishing" of any article. I read these words in their turn, following as they do on a still more rigorous definition—namely, "the making of any article or part of any article," to be narrower in extent than "adapting for sale"; and, taking the last phrase which precedes "adapting for sale," namely, "finishing," it is to be observed that bricks which could be used as rough brick for foundations or for some commercial purposes, when dipped in glaze and scraped and knifed were held to be subjected to the process of "finishing," and the place where they were so finished to be a factory: *Squire* v. *Stanley Brothers.* (1) That was a case of an article adapted for sale in one sense without the finishing, yet not saleable as glazed bricks. In that event, if the process could properly be held to be a finishing of the article, so also a fortiori could it have been said to have been an "adapting for sale."

Even if a commodity is only treated by separating the saleable parts from the unsaleable it may be "an adapting for sale": *Henderson* v. *Glasgow Corporation.* (2) So also packing in ornamental boxes and bottling of beer may fall within the definition: *Fullers, Ld.* v. *Squire* (3); *Hoare* v. *Truman, Hanbury, Buxton & Co.* (4); to which may be added the making up of natural flowers into wreaths and crosses: *Hoare* v. *Robert Green, Ld.* (5)

The case of *Paterson* v. *Hunt* (6), cited as an authority for restricting the meaning of "adapting for sale," is much relied upon by the Crown. In my opinion, that case, which deserves serious consideration although it does not bind us, is one which cannot safely be used for any matter other than that which it actually decides. Sect. 63 of the Factory and Workshop Act, 1901, which was the material section in that case on the conviction and on the facts found and stated, applies only to a factory and not to a workshop and, in order that the premises may be a factory, by s. 149 of the same

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(1) (1901) 84 L. T. 535.
(2) (1900) 2 F. 1127.
(3) [1901] 2 K. B. 209.
(4) (1902) 66 J. P. 342.
(5) [1907] 2 K. B. 315.
(6) 101 L. T. 571.

Act, it is necessary that mechanical power be used in aid of the manufacturing process carried on there. The learned magistrate found, in the Case stated for the opinion of the Divisional Court, that an exceedingly small portion of the treated rags there under consideration were occasionally passed through a shaker to remove dirt and dust, the shaker being driven by an electric motor. This was the only mechanical power which could be relied upon. Although Lord Alverstone C.J. said (1): "I think the only operation really carried on here is the sorting of rags, and I think that the sorting of articles so that they may be sold in different parcels ought not upon such facts as these to be brought either within the words 'manufacturing process' or 'adapting for sale' an article," he continues: "I take the view, not without doubt, that the sorting of these articles is not a manufacturing process and is not an adapting for sale, but is only a sorting of articles for sale." But Darling J. seems to limit his judgment to a finding that there was no mechanical process. Bucknill J. also bases his judgment on this head. As it was not necessary for the purpose of the case, once it was established that there was no mechanical process, to decide whether or not what was done was an "adapting for sale," the remarks of Lord Alverstone C.J. on that matter were not essential to the decision, and I cannot treat that case as going to the extent of deciding that, where there is no physical change in the whole product of the premises but only a separation, such a separation cannot constitute an "adapting for sale."

I think that the observations in *Henderson* v. *Glasgow Corporation* (2), where it was held that works used by the Corporation of Glasgow for separating the saleable parts of refuse from the unsaleable may constitute an "adapting for sale," are more consistent with the intention of s. 149 of the Factory and Workshop Act, 1901, and with the proper interpretation of that section, than are the observations of Lord Alverstone C.J. in *Paterson* v. *Hunt.* (3) In *Henderson's*

(1) 101 L. T. 572.
(2) 2 F. 1127.
(3) 101 L. T. 571.

case Lord Kinnear said (1): "I am quite unable to doubt that the premises in question are premises in which manual labour is exercised for a purpose which is incidental to the preparing of part of this manure for sale."

The Oxford Dictionary definition of "Adapt" includes "to make fit for a purpose." The testing of the cables in this case was, I think, a part of the process of making them fit for the purpose of sale. Indeed, without such a process, their sale would have been prohibited by law. I thus conclude that the phrase "adapting for sale," being so generously construed, includes adaptation for selling, or, to use the language of the Lord Chief Justice (2), "to see that they"—the cables—"have been so adapted."

I agree therefore in this case with the judgment of Greer L.J. that this appeal should be allowed.

(1) 2 F. 1138.

(2) 46 Times L. R. 432.

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THE KING *v.* CORRIGAN.

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Criminal Law—Extradition—France—Surrender on Charge of False Pretences —Power to try for other Offences disclosed in Information on which Surrender grounded—Waiver of Formalities of Extradition—Extradition Act, 1870 (33 *&* 34 *Vict. c.* 52), *s.* 19—*Order in Council dated May* 16, 1878.

The appellant was brought before a tribunal in France on a claim for his extradition on a charge of false pretences. He waived all the formalities of extradition and was handed over to the English police. He was convicted in England on a charge of fraudulent conversion based upon the facts contained in the information upon which the claim for extradition was made:—

Held, that the onus of showing that he had been surrendered in accordance with the extradition treaty between this country and France lay on the appellant, and that he had failed to discharge that onus.

Held, further, that s. 19 of the Extradition Act, 1870, which, in effect, enacts that a person extradited may be tried for any offence which can be proved by the facts upon which the surrender was grounded, was not abrogated by the provisions of Art. IV. of a treaty of extradition made between this country and France, applied to the Act of 1870 by and embodied in an Order in Council, which prohibited the trial of such person for any offence other than that upon which he had been surrendered, and that, consequently, the Court had jurisdiction to try the appellant for fraudulent conversion.

Appeal against conviction.

The appellant, Michael Dennis Corrigan, was convicted at the Central Criminal Court on September 17, 1930, on an indictment containing thirteen counts, of the fraudulent conversion of large sums of money entrusted to him by various persons in order to be applied by him in the purchase of certain oil shares on behalf of the above persons respectively. Another indictment charging the obtaining of the above sums by false pretences was not proceeded with but remained on the file. The appellant was sentenced to five years' penal servitude.

The appellant was arrested in France on November 13, 1929, on a warrant charging him with obtaining money by false pretences. During the course of the proceedings the appellant consented to be handed over to the English police without the formalities of surrender being completed, and he was taken in custody to Boulogne and there handed over. He was, as stated above, not tried on the charge of false pretences upon which he was arrested in France, but was tried and convicted on a charge of fraudulent conversion, which charge was based on the facts contained in the information in pursuance of which he was arrested in France.

Sect. 19 of the Extradition Act, 1870 (33 & 34 Vict. c. 52), enacts that where a person has been surrendered under an extradition treaty he "shall not, until he has been restored or had an opportunity of returning to [the] foreign state, be triable or tried for any offence committed prior to the surrender in any part of [His] Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded."

By Art. IV. of the extradition treaty between this country and France dated August 14, 1876, which was applied to the Act of 1870 by and embodied in an Order in Council dated May 16, 1878, it was stipulated that: "The present treaty shall apply to crimes and offences committed prior to the signature of the treaty; but a person surrendered shall not be tried for any crime or offence committed in the other country before the extradition, other than the crime for which his surrender has been granted."

At the trial it was held that Art. IV. did not abrogate s. 19 of the Act of 1870, and that the Court had jurisdiction to try the appellant for fraudulent conversion, as proved by the facts on which the surrender was grounded, and he was so tried and convicted.

The appellant appealed.

J. P. Eddy and *Maurice Lush* for the appellant. The Court had no jurisdiction to try the appellant. The first question is whether he was in fact surrendered under the treaty. It is submitted that he was. No doubt he waived the formalities, but that left him in the position of one who submits to judgment; the result is a judgment. Although he consented to waive the formalities he was not liberated, but was taken to Boulogne and kept in custody until handed over to the English police. "Surrender" is not a technical word, and the appellant was surrendered in fact.

[The Oxford Dictionary definition of "Extradition," and Halsbury's Laws of England, vol. xiv., tit. "Extradition," par. 924, were referred to.]

On August 14, 1876, an extradition treaty was made between England and France, and by an Order in Council dated May 16, 1878, in pursuance of ss. 2 and 5 of the Extradition Act, 1870, made with France, that Act was applied to the treaty, and the treaty was embodied in the Order. By s. 19 of the Act it was enacted "Where . . . . any person . . . . is surrendered . . . . such person shall not . . . . be triable or tried for any offence committed prior to the surrender . . . . other than such [crime] as may be proved by the facts on which the surrender is grounded." But by s. 2 of the Act the operation of the Order may be subject to such qualifications as may be deemed expedient, and accordingly Art. IV. of the treaty, embodied in the Order, modifies s. 19 of the Act of 1870, in that it enacts that "a person surrendered shall not be tried for any crime or offence committed in the other country before the extradition, other than the crime for which his surrender has been granted."

The treaty must be taken to be incorporated in the Act and to limit its operation—*Reg.* v. *Wilson* (1)—and this case must be determined by the terms of the treaty alone. Therefore the appellant could only be tried on a charge of false pretences, on which charge only he was extradited, and not for fraudulent conversion, of which he was convicted. The learned judge was misled by the passage in Archbold's Criminal Pleadings, 28th ed., p. 180, beginning "Under the Extradition Acts."

[*Ex parte Scott* (2); *Sinclair* v. *Her Majesty's Advocate* (3); the case of the *Lennie Mutineers* (1876)—see Wheaton's International Law, 6th ed., vol. i., p. 223; and *Coldman* v. *Hill* (4) were also referred to.]

In holding that the burden of proving that he was being tried for an offence for which he had not been extradited was on the appellant—see *Reg.* v. *Butler* (5), an Australian

(1) (1877) 3 Q. B. D. 42.
(2) (1829) 9 B. & C. 446.
(3) (1890) 17 R. (J.) 38.
(4) [1919] 1 K. B. 443.
(5) (1897) 18 N. S. W. L. R. 146.

case, and Archbold's Criminal Pleadings, 28th ed., p. 180—the judge wrongly held that that meant that he must produce the order for his surrender. The appellant may prove it in any way. To try the appellant on a charge upon which he was not extradited is a breach of faith with the other contracting party, France: *Rex* v. *Flannery.* (1)

[*Pooley* v. *Whetham* (2); Wheaton's International Law, 6th ed., vol. i., p. 226; and Clarke on Extradition, 4th ed., pp. 227 et seq., were also referred to.]

Eustace Fulton for the Crown. The appellant did not prove that he was surrendered, which means a formal surrender of the accused, under the treaty and the Act, by one state to another according to the procedure prescribed by the surrendering state. His own evidence proved the contrary; it showed that he became tired of his detention in France, and that, in order to terminate it, he waived the formalities which would have constituted his giving up a surrender in the treaty sense. He was not liberated owing to the risk of his changing his mind. The French authorities were relieved of the task of deciding whether or not he ought to be surrendered, and they never did so decide. The surrender was not by France but by the appellant himself.

Maurice Lush replied.

The judgment of the Court (Swift, Acton and Talbot JJ.) was delivered by

Swift J. On September 9, 1930, Michael Dennis Corrigan was given in charge of a jury at the Central Criminal Court upon an indictment containing thirteen counts alleging against him various offences of fraudulent conversion contrary to s. 20, sub-s. 1 (iv.) (*a*), of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50). That indictment, together with one containing charges of obtaining money by false pretences contrary to s. 32, sub-s. 1, of the Act, had been found against him by the grand jury at the Central Criminal Court on June 24, 1930. An application by the defence for the trial to be postponed to July was made at those June sessions at which the bill had

(1) (1923) 19 Alberta L. R. 613.
(2) (1880) 15 Ch. D. 435.

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been found, and on July 15, a further application for postponement was made until September 9 on the application of the defence. Before being given in charge upon the indictment for fraudulent conversion, the prisoner had pleaded "Not guilty." No motion was made to quash the indictment and the trial proceeded in the ordinary way before the learned Commissioner (Judge Holman Gregory) and the jury.

During the cross-examination of the first witness, Mr. Eddy, who represented the prisoner, stated to the Court that "at the proper time I shall object to any counts being left to the jury other than those for false pretences." As a matter of fact there were no charges of false pretences contained in the indictment which was then being tried, but it became apparent in the course of discussion that Mr. Eddy's intention was to object to the accused being tried in this country for any offence other than that of obtaining money by false pretences, on the ground that he had been extradited from France to this country only on charges of false pretences, and that it was therefore not competent to the criminal courts of this country to take cognizance of any other offence than that of obtaining money by false pretences in respect of which he was surrendered to the officers of the English police. In order that it might be determined whether that objection was or was not well founded, it became necessary to ascertain the facts, and from the transcript of the shorthand notes of what took place at the trial, it appears to be quite clear that it was agreed that the burden of proving the facts essential to support Mr. Eddy's contention rested upon the accused and that the ascertainment of such facts from such evidence as might be adduced was the duty of the presiding judge and not a matter for the jury. Both these views are correct. Having heard evidence in regard to this point, the learned judge decided against the contention, and the trial proceeded, with the result that at the end of seven days the prisoner was found guilty upon twelve out of the thirteen counts. No motion was made in arrest of judgment, and the prisoner was sentenced to five years' penal servitude. From this conviction and sentence he has appealed to this Court on nine grounds, which may be conveniently arranged in two groups, the first relating to the contention that the prisoner was not triable in this country upon the indictment upon which he was tried and convicted, because of the law relating to extradited persons, and the second relating to various matters, in which it is said that apart from this contention the trial was improperly conducted, either as regards the admission of evidence or the non-direction or misdirection of the jury.

With regard to the first of these grounds of appeal, Mr. Eddy has very carefully called our attention to the facts which have been proved, and has very fully and with characteristic ability argued the point of law which he alleges arises on these facts ; but in our view, on these grounds of appeal, this Court cannot interfere with this conviction. This argument is based upon s. 19 of the Extradition Act, 1870, and Art. IV. of the treaty dated August 14, 1876, applied by and embodied in the Order in Council of May 16, 1878. Sect. 19 of the Extradition Act, 1870, provides : "Where, in pursuance of any arrangement with a foreign state, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the First Schedule to this Act is surrendered by that foreign state, such person shall not, until he has been restored or had an opportunity of returning to such foreign state, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded." Art. IV. of the treaty of 1876, which is applied by, and is embodied in the Order in Council of May 16, 1878, provides that : "The present treaty shall apply to crimes and offences committed prior to the signature of the treaty ; but a person surrendered shall not be tried for any crime or offence committed in the other country before the extradition, other than the crime for which his surrender has been granted."

It was argued by Mr. Eddy that those words in Art. IV. abrogated or repealed or in some way dispensed with the power which was contained in the last two lines of s. 19 of the Act of 1870 to try a person for any extraditable offence which was proved by the facts on which the surrender of such person was grounded. We do not assent. In our view this contention is wrong, and assuming here a surrender made under the extradition law, it must have been based upon the facts contained in the information and depositions, which disclose not only offences of obtaining money by false pretences, but facts by which fraudulent conversion of such moneys may be proved.

The Court bases its decision upon this ground, and this is sufficient to dispose of the appellant's first grounds of appeal, but the majority of the Court is not satisfied that in this case there was in fact any extradition or surrender at all. The facts are a little difficult to ascertain, and indeed even now what really happened is not quite clear. Mr. Eddy has over and over again invited us to assume that certain things must have happened, but even if it were to be assumed that everything happened as he suggests, it by no means follows that the facts are such that his contention in law is correct. In considering what the facts are, and what they amount to in point of law, it must always be borne in mind that the burden of proving such facts as will establish his contention in law rests upon the accused, who was before the Central Criminal Court on September 9 in lawful custody upon the lawful committal of a metropolitan magistrate, before whom he had been brought upon a lawful warrant issued by him. There was nothing in fact or in law apparent to that Court to prevent it from proceeding to try him upon an indictment which had been found by the grand jury, and if he desired to prevent the Court from proceeding to his trial, the burden was upon him to show beyond reasonable doubt that such facts existed as would render his trial by the law of England illegal and improper. In the view of the learned Commissioner he failed to prove this.

The facts stated before the Commissioner were as follows: On October 21, 1929, one of the magistrates of the police court of the Metropolis issued his warrant to each and all the constables of the metropolitan police force commanding them to bring Kettering Edward Cassidy (the name by which the appellant was then known) before the court of summary jurisdiction sitting at the Marlborough Street police court forthwith to answer an information which had been laid by Derek Dakeyne Cannon and William Winter, alleging that the said Cassidy between July, 1928, and May 2, 1929, did unlawfully by false pretences with intent to defraud obtain of and from the said Cannon the sum of 4900*l.* On November 13, 1929, the appellant was arrested in Paris by the French police. No information was before the Court as to how he came to be arrested, except the statement of the appellant himself, that "I was arrested upon an extradition warrant from England in the case of Derek Dakeyne Cannon." We are asked to assume that such arrest was made by the French police in consequence of a request by the British Government, and that such request was formulated under the statutes, Orders in Council and treaties relating to the extradition of fugitive offenders. It may be that it was so, but there was certainly no evidence of such facts before the Court. No document which could in any way be described as "an extradition warrant," as mentioned by the appellant, was before the Court, and as far as we can ascertain, no such document ever existed. Having been arrested, the appellant was taken, according to his own evidence, five times before a French court, where, according to his own account: "They asked me if I wished to be extradited. My counsel was there and specified the charge, and I was told by the French judge that the charge was obtaining money by false pretences. I particularly asked the judge to specify the charge in detail. Upon that charge I consented to be extradited." After the prisoner's arrest—namely, on November 18, 1929—two other warrants were issued by the metropolitan magistrate for his arrest upon two other charges of obtaining money by false pretences. With reference to these, the appellant said in evidence: "I was sent for by the Public Prosecutor, who showed me two additional warrants which had been sworn after the first one in London in connection with the case of Mrs. Harrold and Mr. Noa. I again asked the specific charge, and I was told, and it was read out to me and I signed the document, that I was charged with obtaining money by false pretences with intent to defraud. Upon that charge I agreed to be extradited instead of opposing it, and upon that charge only. I now find I am being charged with fraudulent conversion." Here again the evidence, or rather, the lack of evidence, is remarkable. The prisoner states that he was taken five times before a French court, that the charges were read out to him, and that he in fact signed documents. No document whatever is produced before this Court, and no information whatever is before the Court as to the nature of the proceedings which the prisoner refers to in his evidence. He goes on to state that after appearing before the French authorities, as above mentioned: "I was taken from Paris in the prison van. I was in a van four days, I arrived at Boulogne at 6.20, a police officer took me over at 6.25 I think, and I was in the boat at 7 o'clock. An order was made in the court in Paris for my extradition." Upon this statement being made, the learned judge at the trial pointed out, and pointed out quite properly, that if an order was made, the order should be produced. The accused then went on to say: "I was informed that the Minister of Justice there sanctioned my extradition, and I then pressed the Foreign Office here to extradite me as quickly as possible, because I did not wish to be there any longer than I could possibly help."

There is in all this account no proper legal evidence to show that extradition proceedings were ever taken against the accused, or that the stages leading up to and appropriate to a surrender under the extradition law were taken; but the absence of evidence does not cease there. The only communication passing between the Government of this country and the Government of France which has been produced to the Court is a letter from the French Government dated January 6, 1930, which states: "On referring to the note of the English Ambassador of November 23 last, the Minister of Foreign Affairs has the honour of stating that the man named Corrigan, Michael Dennis, has consented to be sent back without the fulfilment or accomplishment of the formalities of extradition. The new warrants transmitted to date have been shewn to him, and he maintains his determination to dispense with the formalities and diplomatic guarantees, and that his transfer may take place at once." There is no other document showing that any request, or what request was made by the British Government, nor showing that any order was made by the French Government extraditing him, or, if extraditing him, upon what charges he was in fact extradited.

Upon these facts the prisoner contended that he had been surrendered to the police of this country under the extradition laws, and that he was entitled to any safeguards which the statutes, orders and treaties afforded to extradited persons. As I have said, we are all agreed that having regard to s. 19 of the Extradition Act, 1870, the appellant was properly triable here for fraudulent conversion. The majority of us further think that the learned judge was right in coming to the conclusion that on this evidence the prisoner had not made out that he was surrendered under the extradition law, but that he returned voluntarily, although in custody, to this country to face any charges made against him.

With regard to the second group of grounds of appeal in this case, the appellant alleges that there was a mis-reception of evidence; that there was misdirection of the jury by the learned Commissioner, and that there was non-direction of the jury. In order that those contentions may be appreciated, it is necessary to state very briefly the main facts against the accused. The allegation against him was that he obtained from a Mrs. Harrold and a Mr. Noa over a period of time very considerable sums of money, amounting to many thousands of pounds, by falsely representing to them that he was engaged in some business connected with the Standard Oil Company, and if they entrusted him with their money he was in a position to procure for them shares in that company upon extremely advantageous terms. Having obtained the money from them, money running into, as I say, many thousands of pounds, he did not in any form or shape invest it on their behalf, but he used it for his own purposes, and the jury came to the conclusion, and, indeed, on the evidence they could have come to no other conclusion, that he had fraudulently converted it to his own use. In the course of the trial, whilst these facts were being laid before the jury, evidence was given that at one time the prisoner had been made a bankrupt. The evidence did not disclose, I think, that he was a bankrupt at the time that the facts were occurring which were the basis of the charges of the prosecution against him, but it was proved that at one time he had in fact been adjudicated a bankrupt. It is said that that evidence ought not to have been given, because it was irrelevant to the issues of fraudulent conversion which were before the jury. I cannot follow that contention. The history of the case was that the prisoner was posing before the victims of his fraudulent pretences and fraudulent conversion as a wealthy man, and as part of the history of the case it was the duty of the prosecution to show that he was not a wealthy man at all, but that, on the contrary, at very material times he was a person who had been adjudicated bankrupt, and was occupying the status of a bankrupt. It is very remarkable to observe that when that evidence was given, and it was given at a period long after the discussion which we have just been dealing with—namely, the discussion as to what the man was charged with, and whether he could or could not be charged with the particular offences with which he was charged, and when it was quite clear to the minds of those advising him what the issues, and the only issues, for the jury were, no objection was taken to the evidence which was tendered on behalf of the prosecution. It was given without the slightest comment being made in opposition to it, and without any cross-examination—at any rate, of one of the witnesses—by the counsel for the defence. We cannot think that this evidence was inadmissible. And even if it had been inadmissible, under the circumstances we do not think that it could possibly be said to have adversely affected the result of the trial, and in any event there is nothing in this which gives any ground for allowing this appeal.

With regard to the misdirection, it is pointed out that in a particular passage the learned Commissioner in telling the jury what amounted to fraudulent conversion, did not actually use the word "fraud." I agree that in the particular passage to which our attention was called he did not use the word "fraud" or "fraudulent," but he put before the jury a state of facts which, if they were true, could compel ordinary reasonable people to but one conclusion, and that was that what had been done had been done fraudulently. If the matter stood there, I should have hesitated a long time before I thought that in that there was any misdirection, but it does not stop there, for within a few sentences later the learned Commissioner goes on to point out to the jury that before they can convict the prisoner they must be satisfied that what he did was in truth done fraudulently.

It is said with regard to non-direction that the learned judge did not put before the jury a number of documents in support of the case of the accused that the moneys which he had received from Mrs. Harrold and which he had received from Mr. Noa were moneys which had been received by him not, as they said, for the purpose of investing in shares, but had been received by him for the purpose of loans. It is said that if the jury had seen the cheques and the documents which had been produced in Court and identified by the witnesses, and heard them commented upon by the learned Commissioner, they might have come to a different conclusion, and that his failure to comment upon these documents was a misdirection or a non-direction which in law amounts to misdirection. We cannot take that view. It is perfectly plain that from the beginning to the end the defence of this prisoner that these were mere loans, and that he had made no false pretences, and he had made no fraudulent conversion, was before the jury. It was put fully, adequately and fairly by the learned Commissioner. The prisoner had the advantage at the Central Criminal Court, as he has had the advantage here, of being represented by counsel of great experience and of very great ability, who thoroughly understood his case, and who we know for ourselves here, and believe from the shorthand notes of the trial below, put it quite properly and as well as it could be put by anybody.

Under these circumstances, in the opinion of this Court this appeal fails, and the conviction which is appealed against is affirmed.

Appeal dismissed.

Solicitor for appellant: *Lionel H. Brooks.*
Solicitor for Crown: *Director of Public Prosecutions.*

W. L. L. B.

SITTINGBOURNE URBAN DISTRICT COUNCIL *v.* LIPTON, LIMITED.

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Local Government—Street Improvements—Widening—Improvement Line—"New . . . . erection" beyond Improvement Line—Public Health Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 71), *s.* 33, *sub-s.* 5.

By s. 33, sub-s. 5, of the Public Health Act, 1925: "No new building, erection or excavation shall, after an improvement line has been prescribed, be placed or made nearer to the centre line of the street than the improvement line, except with the consent of the local authority. . . . ."

Held, that the object of s. 33 is to facilitate the widening of streets by enabling local authorities to prescribe an improvement line to which buildings will eventually be set back, and it is contemplated that the authorities will for that purpose then exercise the power conferred on them by s. 154 of the Public Health Act, 1875, of purchasing premises. In order not to increase the burden of compensation which the exercise of that power involves, s. 33, sub-s. 5, enacts that no new erection can be placed on the street side of the improvement line.

The respondents' shop had in 1908 been moved back, leaving a paved forecourt in front of the shop so moved back upon which they used to expose their goods. After an improvement line had been prescribed in 1927, the respondents again enclosed the forecourt into the shop, bringing the shop front back to its old level, which was beyond and on the street side of the improvement line.

Held, that this was a "new . . . . erection" within the meaning of s. 33, sub-s. 5.

CASE stated by Kent justices.

On February 5, 1930, an information was preferred by the clerk to the appellant council under s. 33, sub-s. 12, of the Public Health Act, 1925 (15 & 16 Geo. 5, c. 71), against the respondents, Lipton, Ld., for that they on November 15,

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1929, at 106 and 108 High Street, Sittingbourne, did, without the consent of the appellants first had and obtained, place and make nearer to the centre line of the street than an improvement line duly prescribed by the appellants on June 28, 1928, an erection.

The following facts were admitted or proved at the hearing on March 3, 1930. The appellants had duly adopted Part II. of the Public Health Act, 1925, under s. 3 of the Act, on December 9, 1925, and on June 28, 1927, they duly prescribed an improvement line in High Street above mentioned. The respondents were the owners and occupiers of 106 and 108 High Street. In 1908 they first became tenants of the premises, and with the approval of the appellants set back the shop front on the ground floor to a position shown on a plan. The tiled forecourt resulting was left open to the access of the public, but was habitually used by the respondents for the exhibition of goods. The upper storeys and side walls had throughout projected up to the line of the footpath, the upper storeys being supported both by the side walls and by two iron columns standing on the tiled forecourt. The forecourt projected over the improvement line. On November 15, 1929, works were being executed by the respondents on the above premises, of which works the respondents had not submitted any plan or made any application to the appellants for consent. The works were as follows: The erection of (*a*) a stud partition wall; (*b*) a door frame and door; (*c*) a new shop front, consisting of a wooden framework enclosing plate glass windows, the base of the framework being faced with marble slabs 1¼ inches in thickness. The stud partition and the shop front were wedged into position, and the tiled flooring of the forecourt upon which the new shop front and partition were erected was not interfered with. The whole of these works did not take any of the weight of the upper storeys, and involved no interference with the supporting iron columns, which were merely encased with mirrors for the purpose of decoration. The line of the shop front as altered in 1929 was in the same line as the shop front prior to its alteration by the respondents in 1908, and did not project over the line of the street. The wooden portion of the new shop front, delivered ready made, after being wedged into position was glazed, and the marble slabs referred to attached by screws. The stud partition was erected on the site and faced with matchboard.

The appellants contended that these works constituted an erection and that the word "erection" in s. 33, sub-s. 5 (1), of the Act of 1925 must be given its ordinary and common-sense meaning, and referred to *Mackenzie* v. *Abbott*. (2)

The respondents admitted that the works constituted an erection in the sense that they stood erect, but contended (*a*) that for the purposes of s. 33 of the Act the erection prohibited was a new erection upon land which was not occupied by buildings at the date of the prescription of the improvement line, June 28, 1927, and which therefore might be acquired by the local authority under s. 33, sub-s. 8, of the Act (1), and that inasmuch as the tiled forecourt was at the date of the prescription of such line occupied by buildings, the land could not have been so acquired before the works were executed, and the works would not constitute an erection within the meaning of s. 33, sub-s. 5 (1); (*b*) that the works did not constitute a new erection, because the line of the new shop front was the same as that existing prior to 1908; and (*c*) that s. 33 did not apply to every erection which might be made by an occupier for his own convenience within the boundaries of an existing building.

The justices were of opinion that the works did not constitute an erection within the meaning of s. 33, sub-s. 5 (1), of the Act, and dismissed the information but stated this case.

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(1) Public Health Act, 1925, s. 33, sub-s. 5: "No new building, erection or excavation shall, after an improvement line has been prescribed, be placed or made nearer to the centre line of the street than the improvement line, except with the consent of the local authority. . . ."

Sub-s. 8: "The local authority may purchase any land not occupied by buildings, lying between the improvement line and the boundary of the street, or any interest in such land, and the provisions of the Lands Clauses Acts, including the provisions with respect to the purchase and taking of lands otherwise than by agreement, except sections 92 and 123 of the Lands Clauses Consolidation Act, 1845, shall extend to such land or interest in land."

(2) (1926) 24 L. G. R. 444.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law.

J. Scholefield K.C. and *Erskine Simes* for the appellants. The decision of the justices was wrong. The works in question constituted an erection both in the ordinary meaning of the word and within the meaning of s. 33, sub-s. 5. It was said that the sub-section does not apply to these works, because by the terms of sub-s. 8 of s. 33 the local authority can only purchase land not occupied by buildings, the land being the same as that dealt with in sub-s. 5—namely, that on the street side of the improvement line. Therefore the erection referred to in sub-s. 5 must, in order to be within sub-s. 5, be a new building erected after the building line was prescribed, which this building was not. But that is not so, because the authority might purchase land under sub-s. 8 from which a building which was an erection within the meaning of sub-s. 5 had been removed. The object of s. 33 is to facilitate the widening of streets, and it was contemplated that the local authority would exercise the powers of purchase conferred on them by s. 154 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), for that purpose, and the provisions of the former section were framed in order to prevent the financial burden on the authority being increased, as it would be if they had to pay compensation for buildings as well as for the land.

C. P. Harvey for the respondents. These works were not an erection within the meaning of s. 33, sub-s. 5. No doubt that word is usually applied to any structure that stands erect, but in the sub-section it is used in a more limited sense. It must be such an erection as would affect the exercise of their powers by the local authority under s. 33, sub-s. 8. This is not such an erection, for these works were done on the private land of the respondents and were on the land when the improvement line was prescribed. What has been done

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has not appreciably increased the amount of compensation which would be payable if the local authority exercised their powers under the Act of 1875, for this is really only the substitution of one shop front for another. The works do not constitute a "new" erection, because the line of the new shop front is the same as had previously existed. Unless the meaning to be attached to "erection" is subject to some limitation, then, if an improvement line passed through private premises the owner could not, without the consent of the local authority, set up in a room beyond the building line a mantelpiece or bookcase.

The question whether in all the circumstances these works are capable of being an "erection" within the section is one of degree and, therefore, of fact, and the justices having decided that question their decision ought not to be interfered with: *Ellis* v. *Plumstead Board of Works.* (1) In *St. George's Vestry* v. *Sparrow* (2) the magistrate having found that a conservatory was not an erection within s. 75 of the Metropolis Local Management Acts Amendment Act, 1862 (25 & 26 Vict. c. 102), the Court refused to interfere with his finding. All that the respondents have done is to prevent trespassing on their premises—see *Lavy* v. *London County Council* (3)—for the forecourt was always part of the shop.

Scholefield K.C. in reply. This case raises a question of law; and in any case there was no evidence before the justices upon which they could base their decision if it be a question of fact. But it is not to be supposed that the justices have deliberately stated the appellants out of Court. It being admitted that the amount of compensation payable would be increased by the addition of this structure it is immaterial whether that increase be great or small.

[*Lysaght* v. *Inland Revenue Commissioners* (4) was referred to.]

AVORY J. The information in this case was preferred under s. 33 of the Public Health Act, 1925, and it alleged

(1) (1893) 68 L. T. 291.
(2) (1864) 16 C. B. (N. S.) 209.
(3) [1895] 2 Q. B. 577, 582.
(4) [1927] 2 K. B. 55, 72.

that the respondents, without the consent of the appellants first had and obtained, had placed and made nearer to the centre line of the street than the improvement line duly prescribed, an erection. Upon the hearing of the information it was dismissed by the justices.

I desire first to deal with the point taken by Mr. Harvey in his very able argument, that this ought to be treated as the decision by the justices of a question of fact. In support of his contention he referred us to *Ellis* v. *Plumstead Board of Works* (1) and *Lavy* v. *London County Council* (2), in which, undoubtedly, the judgments went on the ground that the justices in those cases respectively were justified in their findings of fact that the buildings or erections in question did not constitute an infringement of the statute there in question. In other words, I take those judgments to mean this, that where there is evidence upon which the justices can come to the conclusion as a matter of fact that a particular building or erection does not infringe a particular statute the Court of Appeal will not interfere with their decision. In the present case I think that the answer to the respondents' argument is that there was no evidence upon which the justices could find as a matter of fact that what had been done by the respondents was not the making of an erection within the meaning of s. 33, sub-s. 5, of the Act. Looking at the case as stated, and particularly at the contentions which were put forward on behalf of the respondents, I am satisfied that the justices intended to ask the opinion of this Court, as they say they do, upon a point of law—namely, whether what had been done amounted to the making or placing an erection within the meaning of s. 33, sub-s. 5, of the Act of 1925. I can feel no doubt that they gave effect to one or other of the contentions of law put before them by Mr. Harvey. One of those contentions was that sub-s. 8 of s. 33, which provides that the local authority may purchase any land not occupied by buildings, or any interest in such land, and provides also that the provisions of the Lands Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement shall apply, applied to the present case, and that consequently there had been no infringement of the provisions of sub-s. 5 of s. 33. That point was quite properly abandoned by Mr. Harvey, for the provisions of s. 33, sub-s. 8, were enacted for a different purpose altogether, and have no application to the present case. A further point taken was that the erection in this case did not constitute a new erection, because the line of the new shop front was the same as the line was before, and that s. 33 was not intended to apply to every new erection made for his own convenience by an occupier.

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(1) 68 L. T. 291.

(2) [1895] 2 Q. B. 577.

Now in order to determine the question of the meaning of "erection" it is in my view essential to appreciate the object of the provisions of s. 33. That object has been correctly stated by Mr. Scholefield for the appellants, and, in fact, his view has been acquiesced in by Mr. Harvey. That object is to facilitate the widening of streets. The heading to the group of sections is "Street improvements," and in order to facilitate the widening of streets the local authority is authorized by s. 33, sub-s. 1, to lay down an improvement line, i.e. a line to which in the future it is intended that buildings shall be set back. And it is contemplated that in the future the local authority will exercise their powers under s. 154 of the Public Health Act, 1875, to acquire any portions of buildings or erections which are in front of that improvement line, for the purpose of widening the street. Once one appreciates the object of these provisions, it is obvious that in determining whether something which has been done constitutes an erection or building within the meaning of s. 33, sub-s. 5, it is a material consideration whether what has been done will impose upon the local authority a greater burden when they come to exercise their powers under s. 154 of the Act of 1875. It matters not whether the burden will be greater or much greater. In this case what has been done is clearly demonstrated by the plans which are part of the case. It is sufficient for the purpose of my judgment to say that a paved forecourt in front of this shop has now been enclosed and made part of the shop. I cannot doubt that when the time comes for the exercise by the local authority of their powers under s. 154, the acquisition of this piece of the shop will be at greater cost and a greater burden upon them than would have been the acquisition of the forecourt. Looking at the description of this construction I entertain no doubt that what was done amounted to the placing or making of a new erection nearer to the centre line of the street than the improvement line within the meaning of s. 33, sub-s. 5, and that it was not open to the justices to come to the conclusion as they did, for either of the reasons suggested, that it was not within the purview of this sub-section. I think the appeal ought to be allowed, and the case remitted to the justices with instructions to convict.

ACTON J. I agree.

TALBOT J. I am of the same opinion. The object of s. 33 of the Public Health Act, 1925, is plain on the face of the section itself. When the local authority has prescribed an improvement line, the part of the street between the improvement line and the centre of the street is, as far as possible, not to be subject to changes which would make the land or premises more difficult or expensive for the local authority to acquire. Therefore, by s. 33, sub-s. 5: "No new building, erection or excavation shall, after an improvement line has been prescribed, be placed or made nearer to the centre line of the street than the improvement line, except with the consent of the local authority." The right to decide whether such a new building, erection or excavation shall be allowed is conferred on the local authority, who in deciding it will judge whether the construction of the proposed works will affect the exercise of their powers under this or any other Act. I have no doubt, taking the description in the case—which is very clear and definite—of what has been done by the defendants at these premises, that these works are the kind of construction aimed at by s. 33, sub-s. 5, and that they do come within the words "no new building, erection or excavation." The most attractive argument which

Mr. Harvey has put before the Court on behalf of the respondents, is that what the justices decided here was merely a question of fact. But that that is not so, is, I think, shown by the case stated. The justices decided the question as one of law and did so after an argument on points of law, the three heads of which are set out separately in the case.

In cases of this kind there are two questions, first, what are the facts, and, secondly, what is the true construction of the statute. The one is a question of fact, the other a question of law. Generally this is what is meant by the phrase "a question of mixed fact and law." If the Act of Parliament is correctly construed the question is whether the facts found bring the case within its purview. Reference has been made in the course of the argument to the observations of Lopes L.J. in *Lavy* v. *London County Council* (1), where he quoted a passage from the judgment of Lord Coleridge in *Ellis* v. *Plumstead Board of Works*. (2) The distinction between a question of law and one of fact is clearly stated by Lord Loreburn in *Farmer* v. *Cotton's Trustees* (3): "And as their [the Commissioners'] determination is conclusive unless it be erroneous in point of law, we have no jurisdiction to review it upon any issue of fact. We could, of course, interpose if it were clear that the Commissioners had proceeded upon a wrong construction of the Act, and I think they did by regarding the question as one merely of structural separation; but they have not told us what construction they placed upon the Act. If it were necessary I should be disposed to move that this case be remitted for that information to be given. But I do not think it is necessary, because there is another ground of law upon which, I think, the Commissioners are wrong. There is, upon a true construction of the Act, no evidence in this case upon which their decision can be supported. They have given us the relevant facts in detail, and we can see for ourselves that, taking those facts as found, there are no materials at all upon which the conclusion they reached can be based. There was error in law because there was no evidence

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(1) [1895] 2 Q. B. 577, 585.

(2) 68 L. T. 291.

(3) [1915] A. C. 922, 930.

1930

SITTINGBOURNE URBAN COUNCIL v. LIPTON, LD.

Talbot J.

for their conclusion when the Act is rightly construed." In my view these remarks apply to this case. Lord Parker of Waddington said (1): "It may not always be easy to distinguish between questions of fact and questions of law for the purpose of the Taxes Management Act, 1880, or similar provisions in other Acts of Parliament. The views from time to time expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only." In the beginning of his dissenting judgment Lord Sumner said (2): "My Lords, in this case the Commissioners have furnished a description of the building in question, partly in words and partly by plans, so full that your Lordships know as much about it as they did. The rest is matter of law. The question is, 'Does No. 100, Princes Street, Edinburgh, being such as we thus know it to be, come within the words of'" the particular section then in question. These passages define accurately and clearly the mutual relation of questions of law and of fact in cases of this kind. In my view the justices in this case referred to us a question of law, and in my view they came to an erroneous conclusion on that question, and I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Hedley Norris & Co., for Harris & Harris, Sittingbourne.*

Solicitor for respondents: *T. H. B. Bamford.*

(1) [1915] A. C. 932.

(2) [1915] A. C. 938.

W. L. L. B.

WINTER *v.* WOOLFE.

1930
Dec. 1.

Criminal Law—Occupier of Premises knowingly permitting them to be used as "Brothel"—"Brothel"—The Women resorting to the Premises not known by the Police as Prostitutes—Premises kept knowingly for the Purpose of People having illicit sexual Connection there—Criminal Law Amendment Act, 1885 (48 *&* 49 *Vict. c.* 69), *s.* 13, *sub-s.* 2.

On an information under sub-s. 2 of s. 13 of the Criminal Law Amendment Act, 1885, against the occupier of premises, for unlawfully and knowingly permitting them to be used as a brothel, it is not necessary for the Crown to prove that the women resorting to the premises are prostitutes, known, as such, to the police, or that they received payment for acts of fornication, or of indecency, committed by them with men; it is sufficient to prove that with the knowledge of the occupier persons of opposite sexes were permitted there to have illicit sexual intercourse.

Definition of a "brothel" given by Grove and Lopes JJ. in *Reg.* v. *Justices of Parts of Holland, Lincolnshire* ((1882) 46 J. P. 312) approved.

Case stated by two justices.

Information was preferred by William Winter, deputy chief constable for the county of Cambridge, the appellant, under s. 13, sub-s. 2, of the Criminal Law Amendment Act, 1885, against Eileen Allen Woolfe, the respondent, for that she between November 24, 1929, and February 2, 1930, being the occupier of certain premises, known as River Cottage and a dance room, at Fen Ditton, Cambridge, unlawfully and knowingly did permit such premises to be used as a brothel or for the purposes of habitual prostitution. At the conclusion of the case for the prosecution the justices dismissed the information, but consented to state and sign this case.

The respondent was the occupier of a house known as River Cottage, Fen Ditton (about two miles from Cambridge), and of a dance room on ground adjoining. The dance room was open for dancing and teas every Sunday from 4 P.M. to 7 P.M., the music for dancing being sometimes supplied by a band and at others by a gramophone. Paragraphs 5 (*e*) to (*k*) of the case stated described in detail acts of lewdness and impropriety on the part of men and women said to have taken place between 7 and 11 P.M. at these premises on several occasions between the dates charged, and stated that evidence of actual sexual intercourse between a man and woman was seen on November 24, 1929; on December 8, 1929 (twice); on February 2, 1930 (in a motor-car on land adjoining the premises); and on January 26, 1930. At 8.40 P.M. on November 24, 1929, a motor-car arrived containing four men and two girls. The occupants went to River Cottage, when the respondent came to the door and said: "Have you been here before to-night?" and a girl replied: "The men have not, but we girls have." The respondent went across to the dance room with the party, and put on a gramophone record. Among the females present on the respondent's premises on the evening of January 26, 1930, were two women who were known to the police of Cambridge, who were keeping observation on these premises, as morally undesirable characters, and who, because of their behaviour in Cambridge, had been cautioned by the police but had never been convicted as prostitutes. There was no evidence that these two women behaved improperly at any time on these premises.

The respondent was not present on any of the occasions when sexual intercourse took place, but she had knowledge that the couples were on the premises. She was present on various occasions when couples were seen in suggestive and indecent positions. The men present were mostly undergraduate members of the University of Cambridge, and the women were of the working class type. There was no evidence that the women resorting to the premises were convicted prostitutes or received any payments for the acts of indecency that had taken place, and there was no evidence that the respondent made any profit out of the conduct of the premises other than that arising out of the sale of teas and similar refreshments.

At the close of the case for the prosecution it was submitted on behalf of the respondent that upon this charge there was no case to answer. The justices expressed the opinion (1.) that the premises were used for acts of gross indecency and for acts of fornication, the acts of fornication being, in the opinion of one of them, "occasional," and in the opinion of the other of such frequency as to be "habitual"; (2.) that the premises were so used with the knowledge, or at all events with the connivance of the respondent; (3.) that the women resorting to the premises were not prostitutes within the legal definition of the word "prostitute" as laid down in the decisions of *Singleton* v. *Ellison* (1); *Durose* v. *Wilson* (2); and *Rex* v. *De Munck* (3); (4.) that the acts of gross indecency and fornication did not amount to "prostitution" within the meaning of s. 13, sub-s. 2, of the Criminal Law Amendment Act, 1885; and (5.) that the respondent had not committed the offence alleged.

Grafton D. Pryor for the appellant. The justices dismissed this information on the ground that the acts of gross indecency and fornication did not amount to "prostitution" within the meaning of sub-s. 2 of s. 13 of the Criminal Law Amendment Act, 1885 (4), and that the women resorting to these premises were not "prostitutes" within the meaning of the definition of that word in the cases cited to them. It is the fact that there was no proof that the women resorting to the premises were prostitutes in the sense of women known as such to the police, and it is found in the case stated that there was no evidence that these women were convicted prostitutes or received any payments for the acts of indecency that had taken place: see *Rex* v. *De Munck.* (3) The question for the justices was whether there was evidence before them that the respondent unlawfully and knowingly permitted these premises to be used as a brothel within the meaning of sub-s. 2. The justices found that the premises were used for acts of gross indecency and for acts of fornication and that the premises were so used with the knowledge or at all events with the connivance of the respondent. The sole question therefore is: Did this user constitute these premises a brothel? It is submitted that the evidence, as it stood, shewed that these premises were a brothel, or bawdy-house, or common bawdy-house, at common law and a "brothel" within the meaning of this sub-section. In *Reg.* v. *Justices of Parts of Holland, Lincolnshire* (1), where the question was whether there was evidence that a licensed person had permitted his premises to be a brothel, Grove J. said: "What needs only to be proved is this, namely, that the premises were kept knowingly for the purpose of people having illicit sexual connection there," and Lopes J. approved of this definition. In *Singleton* v. *Ellison* (2) Wills J. said: "A brothel is the same thing as a 'bawdy-house'—a term which has a well-known meaning as used by lawyers and in Acts of Parliament. In its legal acceptation it applies to a place resorted to by persons of both sexes for the purpose of prostitution. It is certainly not applicable to the state of things described by the magistrates in this case, where one woman receives a number of men." See also *Caldwell* v. *Leech.* (3) It is submitted that a place may be used as a brothel although there is no actual evidence that the women resorting there receive any payment or that they are known to the police as being prostitutes.

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(1) [1895] 1 Q. B. 607, 608.

(2) (1907) 96 L. T. 645.

(3) [1918] 1 K. B. 635.

(4) Criminal Law Amendment Act, 1885, s. 13: "Any person who—

(1.) keeps or manages or acts or assists in the management of a brothel, or

(2.) being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution or . . . .

shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable—(to the penalty or punishment therein provided. The Criminal Law Amendment Act, 1922 (12 & 13 Geo. 5, c. 56), s. 3, has substituted other penalties and punishments for the original, the provisions for which are repealed).

[SWIFT J. Surely payment in such a case need not be in money: the consideration may be a motor drive, a tea, or a dance ticket. It may well be that prostitution is shewn without proof of the presence of known prostitutes.]

Eustace Fulton for the respondent. The information in this case was misconceived: the respondent should have been charged with keeping a disorderly house other than a brothel. The definition by Wills J. of a brothel in *Singleton* v. *Ellison* (4) shews that it must be a place resorted to by persons of both sexes for the purpose of prostitution. The evidence for the

(1) 46 J. P. 312.
(2) [1895] 1 Q. B. 607, 608.
(3) (1913) 109 L. T. 188.
(4) [1895] 1 Q. B. 607.

Crown here shewed gross impropriety and some cases of fornication, but not prostitution. The mere fact that a girl allows a man to mishandle her does not constitute prostitution nor does it render the girl a prostitute. To establish prostitution there must be some evidence of payment or of professionalism. In the case of *Reg.* v. *Justices of Parts of Holland, Lincolnshire* (1), the two women who entered the premises, were two known prostitutes, and the observations of Grove and of Lopes JJ. were made with reference to the facts of that case. In *Rex* v. *De Munck* (2) Darling J. said that the Court had to decide " what is a prostitute or what is prostitution. . . . . We are of opinion that prostitution is proved if it be shewn that a woman offers her body commonly for lewdness for payment in return." There was no evidence in this prosecution, or in this case stated, that the women resorting to those premises offered their bodies "commonly" or "for payment." The evidence was that on certain occasions there was impropriety between persons of opposite sexes and that the fornication was, in the opinion of one of the justices, "occasional." In Stephen's Digest of the Criminal Law, 5th ed., p. 142, the definition of a " common bawdy-house " is given as " a house or room or set of rooms in any house kept for purposes of prostitution." On an indictment for keeping a bawdy-house at common law a defendant was charged " that for the purpose of gain he kept and maintained a bawdy-house called . . . ." It was customary to join a count for keeping a disorderly house other than a bawdy-house, and that, it is submitted, was to meet such a case as that of which evidence here was given.

Grafton D. Pryor was not called upon to reply.

AVORY J. The respondent in this case, Eileen Allen Woolfe, was charged upon an information for that she on divers days and at divers times on and between November 24, 1929, and February 2, 1930, at the parish of Fen Ditton, in the county of Cambridge, being the occupier of certain premises, known as River Cottage, and a dance room adjoining, unlawfully

(1) 46 J. P. 312.

(2) [1918] 1 K. B. 635, 637.

and knowingly did permit such premises to be used as a brothel, or for the purposes of habitual prostitution contrary to s. 13 of the Criminal Law Amendment Act, 1885. The justices dismissed that information upon the findings and the ground set out in the case stated. They said (*a*) that the premises were used for acts of gross indecency and for acts of fornication—the acts of fornication being in the opinion of one of them occasional, and of the other of such frequency as to be habitual; (*b*) that the premises were so used with the knowledge, or at all events with the connivance of the respondent; and (*c*) that the women resorting to the premises were not "prostitutes" within the meaning of the legal definition of that word as laid down in the decisions that had been cited to them—namely, *Singleton* v. *Ellison* (1); *Durose* v. *Wilson* (2); and *Rex* v. *De Munck*. (3) Lastly the justices said that in their opinion the acts of gross indecency and of fornication did not amount to prostitution within the meaning of this Act. For these reasons the justices came to the conclusion that the respondent had not committed the legal offence that was alleged in the information.

In my opinion the justices have given too restricted a meaning to the word "brothel" as it is used at common law, and as it is used in s. 13 of the Criminal Law Amendment Act, 1885. It is not in fact disputed that the justices have dismissed this information on the ground that the women resorting to these premises were not known by the police as prostitutes, and that there was no evidence that the women resorting to these premises for the purpose of fornication, and resorting to them frequently, received any payment: that appears from the statements of counsel in the argument before this Court to have been the reasoning that influenced the justices. There was evidence before them from which the reasonable inference was that a number of men were resorting to these premises for the purpose of committing fornication with women who resorted there for the same purpose. One example of this evidence is to be found in that

(1) [1895] 1 Q. B. 607. (2) 96 L. T. 645.
(3) [1918] 1 K. B. 635, 637.

paragraph of the case stated, from which it appears that on November 24 at 8.40 P.M. a motor-car arrived containing four men and two girls. The occupants went to River Cottage, and the respondent came to the door and said: "Have you been here before to-night?" and a girl replied: "The men have not, but we girls have." From this and the other evidence in the case the inference is that these girls had been resorting to the place for improper purposes with the men who came with them. That of itself is quite sufficient to justify the inference that these premises were being used for the purposes of prostitution in the ordinary sense of that word—quite apart from any inference that these women could be described in the ordinary sense of the words as public prostitutes. I am content to accept the definition of a brothel given by Grove and Lopes JJ. in the case of *Reg.* v. *Justices of Parts of Holland, Lincolnshire.* (1) Grove J. said: "The sole question is whether there was any evidence to support this conviction before the justices for permitting these licensed premises to be a brothel. . . . . I don't think that the matter of nuisance is of any importance, for it is too well known that these places are often kept in such a way as to be no nuisance at all, but kept perfectly private. But what needs only to be proved is this, namely that the premises were kept knowingly for the purpose of people having illicit sexual connection there." Lopes J. said: "Now, the sole question before the justices was whether the applicant permitted his premises to be a brothel. What is the meaning of permitting the premises to be a brothel? I think my brother Grove has given a very apt definition, namely, that it is permitting people of opposite sexes to come there and have illicit sexual intercourse. That is a very complete and satisfactory definition of the whole matter."

There was in this case evidence upon which the only reasonable inference was that these men and women were resorting to these premises habitually for the purpose of having illicit sexual intercourse, and of this, on the evidence, it is not really disputed that the respondent must have known.

(1) 46 J. P. 312, 313.

In fact, the justices stopped the case at the conclusion of the evidence for the Crown, on the ground that the women who resorted to the premises were not shown to be prostitutes within the ordinary meaning of that word. The appeal will be allowed, and the case remitted to the justices to hear and determine according to the law as it has been laid down by this Court.

SWIFT J. I agree. I am satisfied that there was evidence on which, if uncontradicted, the justices ought to have come to the conclusion that the respondent was unlawfully and knowingly permitting these premises to be used as a brothel. As the evidence stands at present, it appears that these premises were being used with the knowledge or connivance of the respondent for the purpose of people of opposite sexes having illicit sexual connection there—premises of which the respondent had the control, being a bawdy-house at common law, and a brothel within the meaning of s. 13, sub-s. 2, of the Criminal Law Amendment Act, 1885. I say nothing on the question whether it appeared that these premises were being used for the purposes of habitual prostitution. It is sufficient for my judgment in this case to say that in my opinion the evidence, as it stands, shews that these premises were being used as a brothel.

ACTON J. I agree.

Appeal allowed. Case remitted to the justices to hear and determine according to law.

Solicitors for appellant: *Field, Roscoe & Co., for Guy W. Stanley & Shaw, Cambridge.*

Solicitors for respondent: *Smith, Rundell, Dods & Bockett.*

C. G. M.

Referred to. SOLLE v. BUTCHER
[1950] 1 K. B. 674

LEVER BROTHERS, LIMITED, AND OTHERS v. BELL AND ANOTHER.

[1929. L. 1731.]

K. B. D.
1930
March 24, 25, 26, 27; *May* 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27; *June* 5.

C. A.
Oct. 20, 21, 22, 23; *Nov.* 17.

Contract—Mutual Mistake—Mistake as to Legal Rights—Fiduciary Relation—Breach of Duty—Non-disclosure—Rescission of Contract—Frustration.

The L. Company, who held more than 99 per cent. of the share capital of the N. Company, agreed with one B. that he should be in the service of the L. Company for a term of years during which he should act as chairman of the board of directors of the N. Company at a salary of 8000*l.* a year. They made a similar agreement with one S. that he should be vice-chairman of the same board of directors at a salary of 6000*l.* a year. While acting as chairman and vice-chairman respectively B. and S. committed breaches of duty, by secret speculation in the companies' business, which would have justified the L. Company in terminating their agreements of service and the N. Company in dismissing them from their offices of chairman and vice-chairman. Subsequently the N. Company became amalgamated with another company; a new company was formed, and it became necessary to cancel the appointments of B. and S. as chairman and vice-chairman; Being unaware of the aforesaid breaches of duty by B. and S. the L. Company agreed to pay to B. 30,000*l.* as compensation for terminating his service and to S. 20,000*l.* for loss of his office as vice-chairman; B. and S. agreed to accept these sums and they were duly paid. The L. Company, if they had been aware of the breaches of duty by B. and S., would have terminated their agreements, and B. and S. would have been dismissed from their offices without any compensation. When entering into the compensation agreements B. and S. did not fraudulently conceal, but had not present to their minds, or did not appreciate the effect of, the breaches of duty they had committed.

On discovering the breaches the L. Company and the N. Company brought an action against B. and S. claiming rescission of the compensation agreements and repayment of the sums paid thereunder:—

Held, by Wright J. and the Court of Appeal, that the compensation agreements were void, having been made under a common mistake as to the legal relation between the parties, each party believing, contrary to the truth, that the one was entitled to claim and the other was bound to pay compensation.

Cooper v. *Phibbs* (1867) L.R. 2 H.L. 149 followed.

Held, further, by the Court of Appeal, that B. and S. each owed a duty to the L. and N. Companies to disclose and account for the profits of their breaches of duty, and that their non-disclosure invalidated the compensation agreements.

Dictum of Avory J. in *Healey* v. *Société Anonyme Française Rubastic* [1917] 1 K. B. 946, 947, questioned by Scrutton and Lawrence L.JJ.

Kennedy v. *Panama, New Zealand and Australian Royal Mail Co.* (1867) L. R. 2 Q. B. 580, so far as it decides that an innocent misrepresentation,

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LEVER BROTHERS, LD. v. BELL.

although material, is not a ground for rescinding a contract unless it is also fundamental, disapproved by Scrutton L.J.

Seddon v. *North Eastern Salt Co.* [1905] 1 Ch. 326 questioned by the same learned judge.

TRIAL OF ACTION before Wright J. and a special jury of the City of London.

In 1920 the plaintiffs, Lever Brothers, Ld., had acquired a controlling interest in the Niger Company, Ld., which carried on business in cocoa and other commodities in West Africa, Lever Brothers holding 99·53 per cent. of that company's capital. In 1923 an agreement was entered into between Lever Brothers and the defendant Hyslop Bell, by which he was to be in the service of Lever Brothers for five years from November 1, 1923, and was, during that time, to act as chairman of the Niger Company at a salary of 8000*l*. per annum, devoting the whole of his time and attention to the business of the company. In 1926 this agreement was renewed so as to run for five years from July 1, 1926. Similar agreements were entered into between Lever Brothers and Walter Snelling, the other defendant, with the difference that Mr. Snelling was to act as vice-chairman of the Niger Company for the same period at a salary of 6000*l*. per annum.

By a pooling agreement, first made for one year as from October 23, 1925, and subsequently renewed until 1928, between the Niger Company and three competitive companies in West Africa, a pool price for buying and selling was fixed, and during the period covered by the agreements no purchase or sale of cocoa could be made by a company which was party to the agreement by itself or its directors without notification to the pool as to both quantity and price. This agreement contained the following clause: "Throughout this agreement any reference to any party hereto shall, where the context so admits, include its directors for the time being and their partnerships, if any, and also all companies and firms controlled by any party hereto, and each party undertakes that its directors and their partnerships and such companies and firms as aforesaid shall be bound by the terms of this agreement, so far as affects their respective dealings in cocoa, if any, and that all such dealings shall be deemed for all purposes to be acts of such party hereto done under the terms of this agreement and to be accounted for by the respective parties hereto accordingly." By clause 71 of that agreement none of the parties thereto, except with the consent of the pool committee, were to "purchase directly or indirectly in any other country, state or locality than West Africa, cocoa produced in West Africa, Brazil, St. Thomé or San Domingo, nor sell on commission any such cocoa."

The balance of moneys paid by each of the parties to the pool were at certain times to be divided amongst the parties in various proportions. This agreement bound both the defendants, as directors of the Niger Company. The agreement was renewed and continued in force until September 30, 1928.

In 1929 the Niger Company, Ld., and the African and Eastern Company, Ld., both of which were members of the pool, were amalgamated, and a new company was formed, the United East Africa Company, Ld., which acquired the goodwill and assets of the two companies. This rendered it necessary to terminate the defendants' employment as officers of the Niger Company. Accordingly by an agreement dated March 19, 1929, made between Lever Brothers and the defendant Bell, Lever Brothers agreed to pay him as compensation for the termination of the service agreement of July, 1926 (inter alia) the sum of 30,000*l.* in satisfaction of all claims against the plaintiffs and associated companies. A similar agreement was entered into between Lever Brothers and the defendant Snelling, who was to receive 20,000*l.* as compensation for the termination of his services as vice-chairman of the Niger Company under the agreement of July, 1926. These sums were duly paid.

In July, 1929, the plaintiffs discovered that towards the end of 1927 the defendants had entered into certain dealings in cocoa on their own account, which had been kept secret from the Niger Company. The plaintiffs thereupon brought this action claiming damages against the defendants and alleging fraudulent misrepresentation and breach of their contracts of service with the plaintiffs, which breach consisted in their entering into transactions on their own behalf and contrary to their agreements with the plaintiffs. The plaintiffs also claimed the return of 30,000*l.* and 20,000*l.* paid under the agreements made between themselves and the defendants dated March 19, 1929.

The defendants admitted that they were liable to account for the profits on certain private dealings in cocoa, and brought into Court the sum of 1300*l.*, but they denied any further liability.

In answer to the first three questions put to them by the learned judge at the trial, the jury negatived the allegations that the agreements of March 19, 1929, had been induced by fraud or concealment on the part of the defendants. They found however (question 3 (*b*)) that the defendants had committed breaches of contract or duty towards the plaintiffs in entering into certain contracts relating to cocoa as private transactions on their own account and for their own benefit.

The other material findings of the jury were as follows:—

Question 4: (*a*) Were the plaintiffs, Lever Brothers, entitled to terminate the contracts of service with the defendants or either of them (1.) in January, 1928, and (2.) in March, 1929? If so, would the plaintiffs Lever Brothers have elected to exercise such rights at either of such dates?—The answer in each case was "Yes."

(*b*) Were the plaintiffs, the Niger Company, entitled to dismiss the defendants or either of them from their positions as chairman and vice-chairman respectively (1.) in January, 1928; (2.) in March, 1929? If so, would the plaintiffs, the Niger Company, have elected to exercise such right at either of such dates?—The answer in each case was "Yes."

Question 5: When Lever Brothers entered into the agreements of March 19, 1929, did they know of the actings of either of the defendants with regard to the above dealings, i.e., the dealings in cocoa referred to in question 3 (*b*)?—No. If Lever Brothers had so known, would they have made those agreements or either of them?—No. At the date of the respective interviews before those agreements, had the defendant Bell or the defendant Snelling in mind their actings of those transactions ?—No.

The case was then referred into Court for further consideration and argument upon these findings.

Stuart Bevan K.C., *Clement Davies K.C.* and *Wilfred Lewis* for the plaintiffs.

Pritt K.C. and *Vos* for the defendants.

The arguments sufficiently appear from the judgment of the Court.

Cur. adv. vult.

June 5. WRIGHT J. read the following judgment: This case having been tried before a special jury of the City of London, and their verdict taken on the question submitted, there was reserved to the Court the decision whether on the facts found, and such further inferences of fact as the Court might draw, the plaintiffs, Lever Brothers, Ld., were entitled to recover from the defendant Bell the sum of 30,000*l.* and the amount of certain premiums, and from the defendant Snelling the sum of 20,000*l.*, on the ground that the respective agreements under which these sums were paid were entered into under such mutual mistake of fact as to render them not binding, so that the sums so paid are recoverable as paid without consideration.

The material findings of the jury are in answer to questions 3 (*b*), 4, and 5, the jury having negatived by their other findings the allegations that the agreements in question had been induced by fraudulent representations or concealment of the defendants. The position of each defendant, for the purposes of the present question, being indistinguishable in principle, I shall first deal specifically with that of the defendant Bell. Mr. Bell had entered into an agreement with Lever Brothers dated July 1, 1926, which was to continue for five years from July 1, 1926, under which he was to devote the whole of his time and attention during business hours to the business of the company, and was, under that agreement, to act as chairman of the Niger Company, in which Lever Brothers held 99·53 per cent. of the shares. Mr. Bell was to be answerable to the shareholders of the

Niger Company; he was to be paid 8000*l.* a year, and Lever Brothers were also to pay a further sum of 1500*l.* a year as premiums on an endowment policy; he was also to be entitled to contingent further sums by way of commission if the Niger Company's profits exceeded certain sums. The agreement (hereinafter referred to as "the service agreement") was a continuation of an employment which in fact had commenced on November 1, 1923. He had been appointed a director and chairman of the Niger Company in accordance with the service agreement, and so acted till he resigned in pursuance of the agreement referred to. That agreement (hereinafter called "the cancellation agreement") was dated March 19, 1929, and was made between the defendant Bell and Lever Brothers, and under it Lever Brothers were to pay him as compensation for the termination of his service agreement, and consequent loss of office, the sum of 30,000*l.* in full satisfaction and discharge of all claims and demands of any kind against Lever Brothers, the Niger Company, and associated companies. The agreed sum was somewhat in excess of his legal rights, and there was the possible chance of extra commissions, though none so far had been earned. It was not suggested that any claims were being considered other than claims arising in respect of the termination of the service agreement before its due date and for the premature determination of the service agreement. There was also a provision for payment by Lever Brothers until maturity of the premiums on the endowment policy. The cancellation agreement concluded by saying how deeply the Board of Lever Brothers appreciated the work done by the defendant Bell for the Niger Company during the period that he had been in control. This termination of the employment had been rendered necessary by the transfer by the Niger Company of all its assets and management to a new company called the United Africa Company, Ld., in the management of which no place was found for the defendant Bell. A large part of the Niger Company's business while Mr. Bell was the chairman was in dealing in cocoa. Between September, 1925, and September, 1928, the Niger Company had agreed to pool such dealings with three other companies, and, by the agreement regulating the pool, were not to deal in certain cocoa without the consent of the pool committee, and were to report all dealings in cocoa to the committee; and the Niger Company undertook that its directors should be bound by the pool agreement, and any dealings by them in cocoa should be deemed to be dealings of the Niger Company and accounted for accordingly to the pool. In November and December, 1927, the two defendants entered into certain dealings in cocoa on their own account, and it is to these that the findings of the jury refer. These dealings were very carefully and deliberately kept secret from the Niger Company, and were only disclosed by the defendants on or about July 2, 1929 (the defendant Bell having on April 30, 1929, in accordance with the cancellation agreement, resigned his directorship in the Niger Company), when, owing to other circumstances, the plaintiffs were put on inquiry, and had either ascertained or were certain to ascertain these dealings. Thereupon, Lever Brothers' solicitors wrote to Mr. Bell claiming that the secret dealings would have entitled them to terminate the service agreement, and claiming a return of the moneys paid under the cancellation agreement, and a writ was shortly afterwards issued. The two defendants admitted that they were liable to account for the profits on the private dealings in cocoa, and brought into Court the amount—namely, 1360*l.*—but they deny that they can be made to repay the moneys they have received under the cancellation agreements. The question to be determined is whether these agreements should be set aside and declared not binding on the ground of mistake, so that the defendants should be adjudged liable to repay the amounts. "Mistake" is a term used in varying senses in connection with contractual obligations. Prima facie, a party who has entered into a contract cannot claim that he is not bound because he laboured under some mistake. Apart from estoppel, he is bound by the language he has used. It is important to uphold the binding force of contracts so far as possible, especially in commercial matters. But there are certain cases of mistake which justify a Court in saying that there was no true consent, or that the actual contract was not correctly expressed. In the present case the terms of the contract represent correctly what the parties intended to agree, so that no question arises of mistake in expression which might call for rectification; nor was there any mistake of a type which might vitiate consent—for instance, as to what the parties intended their contract to apply to, nor as to the price or consideration, still less as to the identity of the parties. The mistake here invoked is of that type which has often been discussed, and has been described by various terms—for instance, as being mistake of subject matter, or substance, or essence, or fundamental basis. However described, what is meant is some mistake or misapprehension as to some facts (which term here includes particular private rights, as held in *Cooper* v. *Phibbs* (1)), which, by the common intention of the parties, whether expressed or more generally implied, constitute the underlying assumption without which the parties would not have made the contract they did. The simplest and oldest illustration of such mistake is where the parties contracted to sell and buy a specific chattel which at the date of the contract, though both parties thought it existing, had ceased to exist: in that event, however absolute the terms of the contract, there is in law no binding contract, and this principle is now embodied in the Sale of Goods Act, 1893, s. 6. The principle was applied in a sense to the sale of a cargo sold c.i.f. which had, before the date of the contract, owing to sea damage, been properly sold by the shipmaster at a port of refuge, and hence became, without the knowledge of either party, incapable of delivery, though it may be that it still existed: *Couturier* v. *Hastie*. (2) The contract in such cases is void. The same principle has been applied to contracts relating to choses in action: thus, in *Strickland* v. *Turner* (3) there had been the sale of an annuity, and the purchase money paid, but the annuitant had died before the transaction, and accordingly it was held at law that the contract

(1) L. R. 2 H. L. 149. (2) (1856) 5 H. L. C. 673.

(3) (1852) 7 Ex. 208.

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was void and the money paid under it recoverable, because the purchaser had got nothing for his money. At the date of the contract both parties were ignorant of the death, but were treated as intending to contract on the basis of something of value. In a more modern authority, *Scott* v. *Coulson* (1), there was a contract for the sale of a life policy, but before that the assured had died, both parties to the contract being in ignorance of that fact. This transaction was set aside, and Vaughan Williams L.J. thus stated his conclusion: "If we are to take it that it was common ground that, at the date of the contract for the sale of this policy, both the parties to the contract supposed the assured to be alive, it is true that both parties entered into this contract upon the basis of a common affirmative belief that the assured was alive; but as it turned out that this was a common mistake, the contract was one which cannot be enforced. This is so at law; and the plaintiffs do not require to have recourse to equity to rescind the contract, if the basis which both parties recognized as the basis is not true." To the same effect is *Huddersfield Banking Co.* v. *Henry Lister & Son, Ld.* (2), where the Court of Appeal set aside, on the ground of common mistake, a consent order, though completed and acted upon. Lindley L.J. said: "On the same principle, there are cases in equity, of which *Bingham* v. *Bingham* (3) may be referred to as a leading example, in which an agreement to purchase a property was set aside and the money restored, upon the ground that the property really belonged to the man who had professed to buy it. It was a common mistake, and the transaction was set aside." The Lord Justice goes on to cite as further such authorities *Cooper* v. *Phibbs* (4) and *Jones* v. *Clifford*. (5) This principle has been applied to a purchase of shares, as *In re London, Hamburg, and Continental Exchange Bank* (*Emmerson's Case*) (6), of which authority Sir W. Page Wood L.J. said: "In that case the shares had been bought, each party being ignorant

(1) [1903] 2 Ch. 249, 252.
(2) [1895] 2 Ch. 273, 281.
(3) (1748) 1 Ves. Sen. 126.
(4) L. R. 2 H. L. 149.
(5) (1876) 3 Ch. D. 779.
(6) (1866) L. R. 1 Ch. 433.

at the time that a Petition for winding up had been presented, and the Lords Justices held that the Court would not enforce a bargain to buy property which, unknown to the parties, had been destroyed before the time of the contract": *Paine* v. *Hutchinson.* (1) I need not multiply illustrations which are to be found in the books, but I may refer to the decision in *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (2) The Court of Queen's Bench, after a quotation from the Digest as to the distinction between error in ipso corpore and error in substantia, went on to say: "The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." In that case the contract was to take shares. The prospectus in good faith had stated that the company had been granted a valuable contract, and the contention was that the actual failure to obtain that contract made the shares different in substance. The Court there refused to hold that the contract to take shares was not binding, though the misapprehension may have been the actuating motive to the purchaser. There was no complete difference in substance in the shares as they actually were and as they had been believed to be. In the present case the subject matter of the cancellation agreement is the service agreement of 1926. The question is whether the cancellation agreement was made under such a mutual mistake and misapprehension of the parties' rights under that agreement as to render the contract not binding, on the principles laid down in the authorities. In the cancellation agreement it was provided that Mr. Bell was to retire from the boards of the Niger Company and subsidiary companies, and, in consideration of his so doing, Lever Brothers were to pay him, as compensation for the termination of his agreement, the sum of 30,000*l.* The essence of the bargain was the existence of the service agreement as a binding obligation, because it was not

(1) (1868) L. R. 3 Ch. 388, 391.

(2) L. R. 2 Q. B. 580, 588.

suggested that there were any other claims or demands to be discharged outside of those arising under the agreement. Such a bargain was intended to be a purchase by Lever Brothers for a consideration of the rights which Mr. Bell was assumed to have against them under the service agreement, just like the purchase of a chattel or a chose in action. If on March 19, 1929, the service agreement had come to an end by the automatic operation of some resolutive condition contained in it, but neither the possibility nor the fact had been present at the time of the bargain to the mind of either party, I think, on the principles to be derived from the cases I have cited, the bargain embodied in the cancellation agreement could not have stood if, when the facts were ascertained, Lever Brothers claimed to rescind. The existence of the service agreement must, on these principles, be held to have been the substance, or basis, or implied condition of the agreement to pay the money, since, if there was no employment, Mr. Bell would be giving up no rights in return for the money, and Lever Brothers would be paying for nothing. Or, to put it differently, Lever Brothers would be paying compensation, and Mr. Bell receiving it, on the basis that it was in respect of an existing relationship under which Lever Brothers were under obligation to him. In such a case there would, I think, beyond question, be a complete failure of consideration and a complete difference in substance between the actual thing or right and the thing or right for which the parties intended to contract. The case on this assumption would resemble *Galloway* v. *Galloway*. (1) There a bargain by a man to pay a woman money under a deed of separation was set aside on the ground of mutual mistake, because its basis was the belief of both parties that they were husband and wife respectively, whereas there was no marriage, the man's first wife having been alive at the time. The difficulty, however, which arises on the facts of this case is that, though the jury have found that the conduct of the defendants was such as to entitle Lever Brothers to terminate the service contract without compensation,

(1) (1914) 30 Times L. R. 531.

the contract was not in fact so terminated at the date of the cancellation agreement. Lever Brothers had merely an election which they did not exercise, because they did not know of the breaches of duty now established by the verdict of the jury. But the jury have found further that if Lever Brothers had known they would at once have elected to dismiss, and would not have entered into the cancellation agreement or agreed to pay compensation. The question whether the suggested difficulty makes any difference for this purpose must be considered with reference to the whole of these findings. If the jury had found that, though Lever Brothers were entitled in law on the facts to put an end to the service agreement without compensation, but would not have done so, or might not have done so, it may be out of some doubt in their minds, or to avoid a lawsuit, or out of regard for past services, or some such reason, the position might have to be differently considered; but as the findings stand, I think it must be held that the sole idea in the minds of Lever Brothers in making the agreement for compensation was the belief (erroneous, as it proved) that they were under a legal obligation towards the defendant which they could not end against his will, but from which they could only release themselves on the terms of compensating him. It was only their ignorance of these facts which prevented them from simply treating the service agreement as at an end, as they were entitled to do, and would have done if they had known the truth, and the agreement in that event would have been, ipso facto, determined. In my judgment, the mistake or misapprehension here is as to the substance of the whole consideration, and goes "to the root of the whole matter," in the words of the Court in *Kennedy's* case. (1)

I have, for convenience, so far discussed the matter simply in regard to the knowledge of Lever Brothers, but I think from the standpoint of the defendant Bell the existence of a definitely binding contract of employment giving him rights which could only be compromised by compensation, was, in the same way, the root and basis of the cancellation agreement. The jury have found that the conduct complained of was not present to his mind when the cancellation agreement was being negotiated; indeed, it would have been difficult honestly to justify the claims which he made if he had had present to his mind the breaches of duty he had committed, whether or not he fully appreciated what legal effect they might have; and apart from the findings of the jury, I am satisfied from the evidence that his mind was rather dwelling on his services than on any breaches of duty. Under all these circumstances, I hold that the cancellation agreement was entered into in the common belief of both parties that there was a binding contract of employment in the full sense of the term, giving rights to Mr. Bell which Lever Brothers could not take away without his consent and without payment. The jury have found that Lever Brothers would not have entered into the cancellation agreement, if they had known of the circumstances which gave them the right to end the contract without compensation, and quite apart from the view taken by Lever Brothers as to the importance of maintaining a strict sense of business honour in their officials, I hold that, as the jury have found, Lever Brothers would never have agreed (if they had known the truth) to pay these large sums of money by way of consideration for cancelling rights which they were entitled to cancel at their option without paying anything. In my judgment, on the true facts of the case, there was a total failure of consideration such as to vitiate the bargain, because, in the words of Lord Westbury in *Cooper* v. *Phibbs* (1), the parties dealt with one another under a mutual mistake as to their respective rights. Both Lever Brothers and Mr. Bell, in my opinion, at the time of the cancellation agreement, believed they were dealing with an obligation indefeasible save by consent of Mr. Bell. No doubt in every such case the party who profits by the mistake may desire to retain his advantage and contest the rescission of the contract and the consequences of that, but the issue must be determined by reference to the actual facts at the date of the contract

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(1) L. R. 2 Q. B. 580.

(1) L. R. 2 H. L. 149, 170.

on the one side, and on the other side to the mutual conception of both parties (the misconception, as it turned out) as to the facts at the same date.

I have still to consider two cases specifically relied on by Mr. Pritt on behalf of the defendants. One is *Smith* v. *Hughes* (1), which was a decision of the Court of Queen's Bench subsequent to that in *Kennedy's* case (2), though that authority was not cited. The Court in each case included Cockburn C.J. and Blackburn J., and in my judgment the later decision was not intended to qualify, and did not qualify, what was said in the earlier case. *Smith* v. *Hughes* (1) was a case of a sale of specific goods—namely, a parcel of oats by sample; the purchaser said he had wanted old oats, but he had had an opportunity of exercising his own judgment, and there was no warranty given. If the buyer was mistaken as to the actual quality of the oats, that was his affair, in the absence of any promise by the seller that they were old, and the only other suggested mistake on the part of the buyer was as to the extent of the promise given by the seller in reference to the quality of these oats, which mistake, if known to the seller, might estop him from denying that he had promised that they were old oats. There was certainly no mistake as to what the parties were dealing about, which was a specific parcel of oats. That was the subject of their contract. This case seems to be a long way from the present case as I view it, because in the present case there was a complete difference in substance in the nature of the actual thing or chose in action the subject of the service agreement, as compared with the common understanding of both parties as to what they were dealing about. The other case which Mr. Pritt specifically relied on was *Pope & Pearson* v. *Buenos Ayres New Gas Co.* (3), a contract for the sale of coal. The buyers sought to have the contract set aside on the ground of mistake, because they had been misled by an error in a cable sent them by their local manager for their guidance as to the market price of coal at Buenos Ayres. The sellers had seen the cable, and knew in what sense it was understood.

(1) (1871) L. R. 6 Q. B. 597.

(2) L. R. 2 Q. B. 580.

(3) (1892) 8 Times L. R. 758.

The Court of Appeal held there was no common mistake affecting the contract, but merely a mistaken reason in the minds of the buyers for agreeing to pay the price they did. There was no implied condition that the contract was not binding unless the buyers' information which the buyers had or thought they had from their own manager as to the value of the coal was correct. There was, said Lindley L.J., no mistake about the subject-matter of the contract, the coal; but it is the coal which in that case corresponds, in my judgment, with the subject-matter of the service agreement —namely, the obligations and rights existing under the service agreement of 1926, about which subject-matter there was in my opinion the common mistake which I have explained. In my judgment, neither of these cases affords any guidance in the present case except by way of distinction.

Mr. Pritt also contended that the mere fact that the agreement was liable to immediate defeasance once Lever Brothers knew the facts, did not constitute a difference in substance, because the agreement being personal would in any case cease if either defendant were to die, which might conceivably, though not probably, happen at any time. But such contingencies affecting human life must be taken to be in the contemplation of the parties and in themselves would not affect the position. Nor was there in this case any suggestion of a compromise of a disputed claim, such as might constitute consideration for the agreement, even though it eventually proved that Lever Brothers were entitled to end it summarily without compensation. The findings of the jury make it clear that Lever Brothers, as soon as they knew the facts, could and would have so ended the agreement without offering to pay anything, and would have succeeded if sued for wrongful dismissal. Mr. Pritt has further argued that rescission cannot be decreed because restitutio in integrum is impossible. I am not clear that in such a case as the present, if I am right in my judgment as to there being such a common mistake as I have found, the agreement is not void, and there is thus, when the Court has so declared, a simple claim at common law for money had and received.

The cases I have cited show that this may be so, even though the agreement has been carried out by a transfer or assignment, the money being ordered to be repaid and the transfer or assignment cancelled, and the matter closed. There is no question here of what sometimes has to be considered in cases of money had and received, where a substantial delay has elapsed between payment and discovery of the error and claim for repayment. The error was discovered in a short time, and repayment claimed at once, and Mr. Pritt disclaims any suggestion that repayment can be resisted on the ground that the defendant has changed his position on the faith of the payment, a question discussed in *Holt* v. *Markham.* (1) But if the relief here is to be at equity, I think the Court, as a Court of equity, can do all that justice requires to constitute a restitutio in integrum. It can, in ordering rescission of the agreement, order repayment of the moneys paid under the agreement to or for the benefit of Mr. Bell, that is, 30,000*l.* and the premiums. No doubt in pedantic formality restitution would involve abrogating the cancellation agreement and reinstatement of the service agreement, but Lever Brothers would then at once be entitled to give, and would give, a notice of dismissal, which they could justify, and Mr. Bell would be no better off thereby. Similarly, if in order to effect a technical restoration of the status Mr. Bell were allowed to withdraw his resignation as director of the Niger Company, the Niger Company at the cost of a little trouble and delay could, by special resolution, dismiss him, and equally he would derive no benefit. Indeed, Mr. Bell is to this extent better off, as a result of the agreement, because he has enjoyed the moneys paid him for more than a year, no interest being claimed by the statement of claim. As was said by Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.* (2) the practice of a Court of equity is to give relief by way of rescission whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. I think in this case the Court can do what is practically just

(1) [1923] 1 K. B. 504.

(2) (1878) 3 App. Cas. 1218, 1278.

on the facts of the case, which is the only general rule I can deduce from the various cases in equity in which restitutio in integrum has been considered, because what is "practically just" must vary with the facts of the case, just as what is reasonable must vary. The rule is illustrated in *Hulton* v. *Hulton.* (1)

In Mr. Snelling's case, my judgment must be the same. The letter of the agreement of March 19, 1929, is verbally different in some slight respects, but in no material sense, because in his case, as in that of Mr. Bell, there was no suggestion of dealing with any right or claims except under the service agreement, and I see no substantial reason to distinguish his case from that of Mr. Bell for present purposes.

I ought to add that I have not based my judgment on any assumption that the defendants were under a legal obligation to disclose to Lever Brothers or the Niger Company the fact that they had had these secret dealings in cocoa. It was held in *Healey* v. *Société Anonyme Française Rubastic* (2) that in general a servant is under no legal obligation to disclose breaches of duty to his employer. That may be so in general, whatever his obligation in honour may be, but I am far from satisfied that in a case like the present, where the two defendants held positions of great confidence and trust, they were not legally as well as honourably bound to disclose such matters. In addition there were the obligations under the pool agreement, and also the fact that the defendants, as they now admit, were liable to account to the Niger Company for the profit of the secret dealings. This obligation, if it existed, was not relevant to the issue of fraud, because the jury found the breach of duty was not at the date of the agreement in question present to the defendant's mind; but it must have been present at some time at or after January, 1928, when the transactions were settled up and disclosure at any time would have excluded the possibility of the sort of mistake which I have found to have lain at the root of the agreement of March 19, 1929. But I have not thought it necessary to decide the point, nor has it affected my conclusions.

(1) [1917] 1 K. B. 813.
(2) [1917] 1 K. B. 946.

The result will be that there will be judgment for the plaintiffs for the two amounts claimed, and there will be an order for the payment out of Court of the 1360*l.*

Judgment for plaintiffs.

F. P. F.

The defendants appealed. The appeal was heard on Oct. 20, 21, 22, 23, 1930.

A. T. Miller K.C., *Pritt K.C.* and *Vos* for the appellants. The learned judge has held that, because the respondents would have terminated the services of the appellants unconditionally if the facts had been known, therefore the compensation agreements were void, on the ground of mutual mistake. This might have been good law if the agreements of service had been rendered void by the appellants' breaches of duty. Sir William Anson in his work on Contracts, in dealing with the subject of mistake, says that, apart from cases of dishonesty, "there are cases of genuine mutual mistake where parties contract for a thing which has ceased to exist, or are in error as to the identity of one another or of the subject of the contract": see Anson on Contract, 16th ed. (1923), p. 163. Not one of these three cases has occurred here. The last two may be dismissed as irrelevant. The first has no application, because the thing for which the parties were contracting—namely, the compensation to be paid to the appellants on the termination of their contracts of service—had not ceased to exist. The contracts of service were still in existence. They were not void contracts, but were voidable only, that is to say valid until they were set aside. There was no mutual mistake about these contracts or the compensation to be paid for them while they existed. The respondents believed that they were bound to retain the services of the appellants; and so they were unless and until the contracts of service were set aside. The appellants believed they were entitled to compensation for loss of their employment, and so they were as long as the contracts of service remained in force. No doubt the jury have found that the respondents would have put an end to the contracts of service if they had known all the facts; but how could the jury know that? The finding merely means that there was good reason for putting an end to the contracts of service without payment of compensation; it cannot be relied on as having the effect of avoiding those contracts. In each of the cases cited by the learned judge in support of his judgment the subject matter of the contract did not exist or had ceased to exist, at any rate for the purposes of the contract: in *Couturier* v. *Hastie* (1), the cargo of grain; in *Strickland* v. *Turner* (2), the annuity; in *In re London, Hamburg, and Continental Exchange Bank* (*Emmerson's* case (3)), the shares of a company in process of liquidation; see *Paine* v. *Hutchinson* (4); in *Scott* v. *Coulson* (5), the life of the assured; in *Galloway* v. *Galloway* (6), the relation of husband and wife. In *Bingham* v. *Bingham* (7), *Cooper* v. *Phibbs* (8), the properties, the subject of the sale in the first case and of the lease in the second, were already at the date of the several transactions the property of the purchaser and of the lessee respectively. In *Huddersfield Banking Co.* v. *Henry Lister & Son, Ld.* (9) the plaintiffs in a debenture holders' action had agreed to an order for the sale of certain looms, which turned out to be part of their own security. The respondents were under a mistake as regards their right to terminate the contracts of service; but that was a unilateral mistake, and, assuming that the contracts of service may be taken as the subject matter of the compensation agreements, a mistake by one party to a contract about the subject matter of the contract not induced by the conduct of the other party is not sufficient to avoid the contract: *Smith* v. *Hughes* (10); *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (11), so far from being an authority in favour of the respondents goes far to support the case for the appellants. There a company issued a

(1) 5 H. L. C. 673.
(2) 7 Ex. 208.
(3) L. R. 1 Ch. 433.
(4) L. R. 3 Ch. 388, 391.
(5) [1903] 2 Ch. 249.
(6) 30 Times L. R. 531.
(7) 1 Ves. Sen. 126.
(8) L. R. 2 H. L. 149.
(9) [1895] 2 Ch. 273.
(10) L. R. 6 Q. B. 597.
(11) L. R. 2 Q. B. 580.

prospectus inviting applications for new shares to enable them to carry out a contract which they bona fide, but erroneously, believed they had entered into with the Government of New Zealand. The plaintiff under the same mistaken belief applied for and obtained an allotment. When the mistake was discovered the plaintiff claimed to recover instalments paid by him on his allotment; and there was a second action in which the company claimed for calls unpaid on the shares. It was held that, as the plaintiff had acquired the shares he had applied for and as there was not a complete difference in substance between the shares he got and those he thought he was getting, he could not complain of a failure of consideration; and unless he could do that, he could not set aside the allotment and recover the instalments. It cannot be argued that there was any failure of consideration so long as the contracts of service remained standing. The jury have negatived all fraud in this case. It is a case of mutual mistake or nothing. Even if the conduct of the appellants can be construed into a misrepresentation it was an innocent misrepresentation and, unless it goes to the root of the contract, is insufficient to avoid an executed contract: *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (1); *Seddon* v. *North Eastern Salt Co.* (2) Opinions differ on the question whether an innocent misrepresentation, not going to the root of a contract, will avail to rescind the contract while still in fieri, Salmond and Winfield inclining to the view that it would: see Law of Contracts, ed. 1927, pp. 208, 230, while Sir Frederick Pollock is of the contrary opinion: Pollock on Principles of Contract, 9th ed. (1921), p. 599. In the present case, however, the agreements were executed; the services were terminated and the compensation was paid. The mistake did not affect the contract but only the respondents' reasons for entering into it, as in *Pope and Pearson* v. *Buenos Ayres New Gas Co.* (3) and *Fletcher* v. *Krell* (4), where the plaintiff engaged herself as a governess

(1) L. R. 2 Q. B. 580.

(2) [1905] 1 Ch. 326. See also *Angel* v. *Jay* [1911] 1 K. B. 666.

(3) 8 Times L. R. 758.

(4) (1872) 42 L. J. (Q. B.) 55.

for three years, describing herself as "Margaret Fletcher, spinster," and concealing the fact that she had been divorced from her husband.

[GREER L.J. If this action had been brought for breach of the appellants' duty to disclose their secret dealings in cocoa, what answer would there have been to it ?]

They were not bound to disclose their breaches of duty: *Healey* v. *Société Anonyme Française Rubastic* (1), cited without disapproval by Lord Warrington in *Ramsden* v. *David Sharratt & Sons, Ld.* (2)

Sir John Simon K.C., *Stuart Bevan K.C.*, *Wilfrid Lewis* and *George Bankes* for the respondents. The appellants, in addition to their duty to abstain from speculating in cocoa on their own behalf, owed a duty to disclose and account for any profit they made in such adventures: Bowstead on Agency, art. 50, 7th ed. (1924), p. 139. Beyond all doubt they owed this duty to the Niger Company, being directors of that company. By contract they owed a duty to Lever Brothers to disclose and account to the Niger Company. Their failure to perform this duty was a most important fact in inducing the respondents to enter into the compensation agreements. Therefore if this was a case of unilateral mistake it is within the exception to the rule in *Smith* v. *Hughes* (3) that a unilateral mistake will not avail to invalidate a contract, because here the mistake was induced by the conduct of the other party. But in truth the mistake was mutual. Each party believed that the contracts of service, which were being cancelled upon terms, were valid contracts. In fact they were invalid. "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake": *Cooper* v. *Phibbs* (4) per Lord Westbury. The contract is not merely liable to be set aside. It is actually void.

A. T. Miller K.C. in reply.

Cur. adv. vult.

(1) [1917] 1 K. B. 946.

(2) (1930) 35 Com. Cas. 314.

(3) L. R. 6 Q. B. 597.

(4) L. R. 2 H. L. 149, 170.

Nov. 17. The following written judgments were delivered :—

SCRUTTON L.J. This is an appeal from a judgment of Wright J., who has ordered the two defendants Bell and Snelling to repay to the plaintiffs Lever Brothers and the Niger Company two large sums of money, in the case of Bell 30,000*l.*, and in the case of Snelling 20,000*l.*, originally paid to them by the plaintiffs under contracts made in March, 1929, as the price of cancelling previous contracts of service.

The ground on which the judge has ordered repayment is that there was a mutual and fundamental mistake as to the nature of the agreements cancelled ; that, whereas both parties supposed that those agreements, which conferred valuable rights on the defendants, could only be cancelled with the consent of the defendants and on such terms as they agreed to, in fact events, i.e., misconduct of the defendants, had happened of which the plaintiffs were ignorant, and which the defendants had forgotten and did not understand the effect of, which entitled the plaintiffs forthwith to cancel the agreements without any payment. Both parties thought the agreements were worth 50,000*l.* to the defendants, whereas, when the real facts were known, the agreements, to the defendants, were worth nothing ; the plaintiffs need not have paid anything in order to cancel them. On this ground the judge ordered the defendants to repay the 50,000*l.* in question. The defendants appealed.

The case was tried with a jury, who made a number of findings of fact, against which there is no appeal. When the questions to be put were discussed, this appears on p. 837 of the shorthand notes taken at the trial : "(Wright J.): Now, rescission of the agreements you agree must be left to me ? (Mr. Stuart Bevan) : That must be left to your Lordship. (Wright J.) : On any point left to me, I must have leave to draw inferences of fact. (Mr. Pritt) : Your Lordship must have that leave generally. (Mr. Stuart Bevan) : I am in complete agreement with that." From the findings of the jury, the judgment of the judge, and the admitted documents, it is possible to state the relevant facts.

Lever Brothers, Ld., controlled a number of companies trading with the West Coast of Africa. In particular they owned 99½ per cent. of the ordinary shares of the Niger Company. This company was not doing well, and Lever Brothers desired to reorganize its management. For this purpose Lever Brothers, by agreements in August, 1923, extended and revised in July, 1926, employed Mr. Bell, a banker, as chairman of the Niger Company at a salary of 8000*l.* a year, and Mr. Snelling, an accountant, who had been concerned with the taxation liabilities of companies controlled by Lever Brothers, as vice-chairman of the Niger Company at a salary of 6000*l.* a year, for a term which would expire on July 1, 1931. Bell and Snelling, becoming as they did chairman and vice-chairman of the Niger Company, had rights against both the Niger Company and Lever Brothers; they also owed duties to both companies. When at the time of the first agreement Bell asked that he should not be answerable to any one but the committee of control of Lever Brothers (see letter of August 8, 1923), it was pointed out to him, and he agreed, that he was also answerable to the shareholders of the Niger Company.

By further agreements of October 23, 1925, and October 1, 1926, a pool in cocoa purchases was constituted between the Niger Company and three other West African companies, which was to control all purchases and sales by the parties of West African and other cocoa. No party was to deal in cocoa without the consent of the pooling committee. Both Bell and Snelling were well aware of these agreements and their terms. Snelling signed the first agreement, Bell the second agreement, on behalf of the Niger Company. Snelling was a member of the committee which administered the pool. The agreements contained clauses by which the Niger Company undertook that its directors should be bound by the agreement, that they should not do business contrary to the agreement, and that the Niger Company should account for any acts of its directors as regards their respective dealings in cocoa. In spite of this agreement, which those who signed it and carried it out cannot be heard to say they were ignorant of, Bell and Snelling, apparently on Snelling's suggestion, in November and December, 1927, engaged in what they called a "flutter" in buying and selling cocoa for their private advantage. These transactions were not communicated to the Niger Company or to Lever Brothers, and by the system adopted they were kept secret as far as documentary evidence was concerned. One of the transactions resulted in a profit of 1360*l.* These transactions were clearly breaches of the obligation of the directors to their company and to Lever Brothers not to trade privately in the commodities in which their company was trading, and they were breaches of the pooling agreement, rendering the Niger Company liable to the other parties to that agreement. The jury have found that the transactions were breaches of the defendants' agreements of employment which would entitle their employers to determine those agreements forthwith, and that their employers would have determined the agreements had they known of the transactions. There is no appeal against those findings, and I entirely agree with them. But the employers did not know of these transactions, which were not disclosed to them. The defendants must at the time have known of the transactions and of the agreements of which they were breaches. The jury have found that at the time the agreement now to be mentioned was negotiated, Bell and Snelling "had not in mind their actings in respect of these transactions." The jury have also found that at the time of these negotiations Bell and Snelling did not "fraudulently misrepresent" that they had faithfully served Lever Brothers or the Niger Company, and that at that time they did not "fraudulently conceal" the transactions in question. I take these findings to mean that the defendants did not fail to disclose these transactions with intent to deceive, and did not make any untrue statement about their conduct with the same intent.

The Niger Company and Lever Brothers, being ignorant of these breaches of agreement, in March, 1929, were desirous of reorganizing their affairs and amalgamating with a rival company, and the position of the two defendants stood in

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the way of that reorganization. Means of terminating their agreements were discussed, and it was ultimately agreed that the defendants should resign their positions in consideration, amongst other matters, of a payment of 30,000*l.* to Bell and 20,000*l.* to Snelling. These payments were made, and they did so resign. The jury found that at the time of these agreements Lever Brothers were ignorant of the breaches of the previous agreements in question, and that if they had known of them they would not have made the cancelling agreements, but would have at once terminated the defendants' employment without compensation. It is pretty obvious that Lever Brothers would not pay 50,000*l.* for an advantage which, because of the misconduct of the proposed payees, Lever Brothers could get for nothing. The payment was not made to avoid or compromise a lawsuit (1), for Lever Brothers knew of no grounds for a claim by themselves to terminate the agreement as of right. However, in June, 1929, quarrels arose amongst the parties to the pool, and allegations were made that the Niger Company had broken the pooling agreement by dealings in cocoa without the authorization of the pool committee. The Niger Company asked their brokers for particulars of their transactions, which had been carried out, to ensure secrecy in the brokers' office, under initials and sometimes in the names of nominees. The brokers sent a list, some items of which could not be identified by the Niger Company's documents, being in fact the private transactions of Bell and Snelling. When they were asked, as chairman and vice-chairman, what these unidentified transactions were, thereupon for the first time Bell disclosed the nature of these private transactions, stating that he was not aware of the " directors " clause in the agreement he had signed, and which, as chairman of the company, he ought to have carried out on behalf of the company. He offered to return to the Niger Company the profit made. Lever Brothers, however, desired to cancel or set aside the agreement under which they had paid the

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(1) As in *Callisher* v. *Bischoffsheim* (1870) L. R. 5 Q. B. 449, where a compromise was held good, although there was no cause of action.

50,000*l.* to terminate an agreement, which, if they had known what the other parties to the agreement, their employees, had done, they could have cancelled without any payment at all, and on August 7, 1929, they issued the writ in the action, asking amongst other things for cancellation or rescission of the cancelling agreement of March, 1929, for repayment of all moneys paid thereunder, and for repayment of all moneys paid under a mistake of fact, and for an account and repayment of all secret profits made in breach of a contract of employment.

The learned judge, citing a number of cases, has held that the facts of this case bring it within the scope of the proposition that where two parties enter into an agreement under a mutual mistake as to the identity or existence or fundamental nature of the subject matter, the contract is void, and money paid under it can be recovered. The defendants object to this decision on two grounds: first, that mutual mistake is not pleaded; secondly, that the facts of this case do not bring it within the authorities cited, the mutual mistake being only as to an incident of a really existing contract, a fact which does not in itself avoid an existing contract, but only gives rise to a power to avoid it, which had not been exercised when the payments sought to be recovered were made. I understood them to suggest that the employer did not know what had happened, the employee had known what had happened, but had either forgotten it or did not understand its possible legal effect, and that this was not a "mutual mistake."

As to the pleading point, I think it is correct to say that the plaintiffs did not allege in their pleadings mutual mistake as a ground for treating the contract for payment as void and recovering the money paid under it. Clause 26 of the claim, repeated in the amended claim, was as follows: "Alternatively the said agreements and each of them were made and the moneys paid thereunder were paid under a mistake of fact," but the particulars of this paragraph in the letter of January 21, 1930, I think refer only to the mistake of the plaintiffs. In my opinion the practice of the Courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigated at the trial. Now in the present case there is no dispute that the plaintiffs did not know at the time they negotiated the cancellation agreement of the private speculations of the defendants, and would not have entered into the cancellation agreement if they had known of them. They were under a mistake as to the legal position of the defendants in respect to their agreement of service; they thought that agreement could only be terminated with the consent of the defendants, whereas they, the plaintiffs, could terminate it at once without the consent of the defendants and without paying 50,000*l.* This mistake was pleaded. The defendants were in a difficulty: if they said they were under no mistake as to their position under the agreement of service, they had broken that agreement; they had not disclosed their breaches to their employers, and they were taking money which, owing to their conduct, they could not properly claim from employers whom they had kept in ignorance of that conduct which prevented their claiming the money as of right. This would tell against them on the issues of fraudulent concealment and misrepresentation. But the jury have found this was not their position, which must have been that they honestly but mistakenly believed that their contract of service could not have been terminated without their consent or the money payment they demanded. The learned judge obviously had mutual mistake in his mind during the trial; one at least of the cases cited during the argument turned on it: *Galloway* v. *Galloway* (1), a case of a mutual mistake as to the existence of a valid marriage. [The Lord Justice then read a passage from the shorthand note taken at the trial, showing that the effect of the mutual mistake upon the validity of the compensation agreements had been raised in the Court below, and continued:] In my opinion, therefore, the question as to

(1) 30 Times L. R. 531.

mutual mistake needs no further evidence to elucidate its legal effect, and can be dealt with on the facts admitted and found by the jury or inferred by the judge without any amendment of the pleadings.

There remains then the question whether, on the facts admitted or found, the judge was right in holding that the cancellation agreements were invalidated on the ground of mutual mistake, so that payments made under them could be recovered. In the Coronation cases (1) the doctrine of "frustration" was held to apply where, though the subject matter of the contract still existed, a connected state of facts, vital to the continuance of the contract, had ceased to exist. In the cases where the Great War prevented the performance of the contract, valid when made, for a substantial part of the time of performance originally contemplated, the fundamental change of circumstances was held to render the contract void, not voidable. The reason of this avoiding of the contract was fully explained. I refer to Lord Sumner's judgment in *Bank Line, Ld.* v. *Arthur Capel & Co.* (2), where the House of Lords adopted the result of my dissenting judgment in the Court of Appeal, and Lord Sumner adopted its reasoning; and to the judgments in the various stages of *Metropolitan Water Board* v. *Dick, Kerr & Co.* (3) I do not repeat my judgment in that case. In my opinion, the present law is that where at the time of making the contract the circumstances are such that the continuance of a particular state of things is in the contemplation of both parties fundamental to the continued validity of the contract, and that state of things substantially ceases to exist without fault of either party, the contract becomes void from the time of such cessation, the loss falling where it lies. This may be put either on implied contract or on destruction of the foundation or root of the contract before its term of performance has expired. The contract is valid when made, for its implied foundation then exists, but

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(1) See *Krell* v. *Henry* [1903] 2 K. B. 740; *Elliott* v. *Crutchley* [1906] A. C. 7.

(2) [1919] A. C. 435.

(3) [1917] 2 K. B. 1, 28 et seq.; [1918] A. C. 119.

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becomes void when during the term the foundation ceases to exist.

Now consider the case where the implied foundation is assumed by both parties to exist at the time of making the contract, but does not in fact exist. One may describe the result as either that the contract is void because of an implied term that its validity shall depend on the existence at the time of the contract, and during its term of performance, of a particular state of facts, or (which is only another way of putting the proposition) that there is a mutual mistake of the parties, who make the contract believing that a particular foundation to it exists, which is essential to its existence, a fundamental reason for making it. In either case the absence of the assumed foundation makes the contract void. Vaughan Williams L.J. put the matter in *Krell* v. *Henry* (1) as " the question whether " the " substantial contract needs for its foundation the assumption of the existence of a particular state of things." That may be simply a thing, as where there is a contract to purchase a thing, which, though the parties do not know it, has perished at the date of the contract; or the purchase of an annuity where the annuitant is dead at the time of the purchase. It may be a right to a thing, as where the thing purchased is really the property of the purchaser and not of the vendor. As Lord Westbury puts it in *Cooper* v. *Phibbs* (2): " If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake." Later authorities show that the language should be " is void," and any revival is made, not by electing not to set aside, but by a new contract. An excellent illustration is found in *Galloway* v. *Galloway* (3), where the parties, believing themselves to be husband and wife, entered into a deed of separation involving money payments. In fact they were not husband and wife, as one of them was already married to a spouse still alive. The deed was declared void. I regret that the judgment of Bray J. is not reported, but

(1) [1903] 2 K. B. 740, 749.
(2) L. R. 2 H. L. 149, 170.
(3) 30 Times L. R. 531.

the ground obviously is that though the parties were under no mistake as to the terms of the separation deed, they were under a mutual mistake as to their relation to each other, the assumed relation being vital to the separation agreement, the real relation affording no ground for it.

Now if this is the law, what was the position at the time of making the agreements now sought to be declared void? The employers thought they were bound for a term of two years, and must pay a sum which would satisfy the defendants if they desired to escape from their obligation. In fact, owing to the misconduct of their servants, the defendants, of which the employers were ignorant, though the contracts of employment were not void ipso facto, they could be cancelled by the employers without any payment at all, and the jury have found that the employers would have cancelled them. To the employers there was a difference of 50,000*l.* between the assumed and the real position. The defendants, according to the jury's finding, negotiated without having in their mind these secret transactions or their effect, and were obviously acting on the assumption that they could make their own terms for giving up an agreement which could not be terminated without their consent. If they had correctly appreciated the position, they could not have honestly demanded compensation for terminating agreements which the employers, if they had known the facts which their servants had failed to disclose, could and would have terminated without compensation.

I have stated my views of the legal position in deference to the careful argument presented to us by Mr. Miller and Mr. Pritt for the defendants; but I entirely agree with the judgment of Wright J. on this point, and have not repeated the authorities and reasons which he cites in support of his judgment, with which I agree. But I desire to say further that in my opinion the judgment can be supported on the ground of an obligation on the defendants to disclose and account for their dealings, and a failure at the time of making the agreement to disclose these material facts. I do not propose to lay down any general rule for disclosure by servants: I only desire to say that I notice that Wright J. held himself bound by the remark of Avory J. in *Healey* v. *Société Anonyme Française Rubastic* (1): "I cannot accept the view that an omission to confess or disclose his own misdoing was in itself a breach of the contract on the part of the plaintiff." This statement was also accepted, though I think it was not material to his decision, by Lord Warrington in *Ramsden* v. *David Sharratt & Sons, Ld.* (2) I must reserve myself liberty to reconsider this as a general rule if it becomes relevant in any subsequent case. I cannot think that a servant who knows his fellow servant is stealing the goods of his employer is under no obligation to disclose this to his employer. If the servant himself has stolen goods, and his employer, finding out the theft, accuses an innocent fellow servant of having committed it, is not the real thief bound to inform his employer of his delinquency? His theft is a vital breach of his contract of employment: is he not bound by his contract of service to inform his employer of acts detrimental to his employer? However, it is not in the present case necessary to lay down any general rule: it is enough to deal with the present case. The defendants are secretly carrying on transactions in relation to the subject matter of their Company's business without disclosing them to their Company of which they are Chairman and Vice-Chairman. They are bound to account for the profits they make in this competitive business, and therefore to disclose their dealings to their employers. They are in so dealing causing their employers to break the contract the employers have with the pool, of which the defendants know or ought to have known: and, lastly, they are negotiating with their employers as to the cancellation of the contracts they have with them without disclosing their dealings, material to that negotiation, which they have known of, and the legal effect of which they ought to have known. In contracts or obligations to disclose material facts, as in contracts of marine insurance, that a man did not think the fact material is no defence, if the fact would affect a reasonable man in his negotiation of the contract. Honest, though mistaken, failure to disclose material facts you knew or ought to have remembered or appreciated is still concealment. Fraud is not necessary to constitute concealment in contracts involving an obligation to disclose, except in special cases like guarantees.

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(1) [1917] 1 K. B. 946, 947

(2) 35 Com. Cas. 314, 319.

In my opinion, on the facts of the present case the defendants were under an obligation, before and at the time of their negotiation of the contracts to terminate their services, to disclose their dealings in breach of their contracts, and the contracts to terminate can be avoided by this non-disclosure. Wright J.'s ground of decision, with which I agree, is sufficient to support his judgment, but I think it could also be supported on the ground of failure to disclose material facts.

I only desire to add that, in my view, the case of *Kennedy* v. *Panama Etc. Co.* (1), so far as it decides that an innocent misrepresentation, though material, is not a ground for rescission unless it is also fundamental, is no longer law, in view of the fusion of common law and equity by the Judicature Acts, the rule of equity prevailing. Also I reserve liberty to consider the decision in *Seddon* v. *North Eastern Salt Co.* (2), so far as it decides that executed contracts cannot be rescinded for innocent and material misrepresentation.

The appeal must be dismissed with costs.

LAWRENCE L.J. In my judgment, this appeal fails. The appellants, although in receipt of very handsome salaries, were unable to resist the temptation of availing themselves of the opportunity afforded to them under their service agreements of adding to their remuneration by secretly entering into speculations in cocoa on their own account. By so doing they not only abused the confidence which had been reposed in them and placed themselves in a position in which their personal interests were likely to conflict with their duties, but also subjected the Niger Company, whose

(1) L. R. 2 Q. B. 580.

(2) [1905] 1 Ch. 326. See also *Angel* v. *Jay* [1911] 1 K. B. 666.

interests it was their duty to safeguard, to a serious liability for breaking its obligations under the pooling agreements. The elaborate precautions taken by the appellants to keep the knowledge of these speculations from Lever Brothers and the Niger Company show conclusively that they were fully alive to the fact that they were doing wrong. Although the appellants stopped their speculations and destroyed the documents relating thereto early in January, 1928, it is plain that they intended to retain the profits which they had made, and that they would not have accounted for them unless they had been found out. In the circumstances, I confess to having considerable difficulty in believing that the fact of having entered into these secret transactions and having made these illicit profits had altogether passed from the minds of the appellants when, not long afterwards, they were negotiating for the payment of a large sum for the termination of their services. However, the jury (influenced no doubt by the unfounded charge made against the appellants of having fraudulently appropriated as their own certain profitable transactions entered into by them on behalf of the Niger Company) has mercifully found that the appellants, when negotiating for the termination of the service agreements, had not in mind that they had wrongfully entered into private speculations of their own.

It is obvious that if the appellants had then had these secret speculations in mind and had abstained from disclosing them, they would have run a serious risk of a finding by the jury that the cancellation agreements had been obtained by fraudulent concealment. Accepting the jury's finding that the appellants had forgotten their wrongful acts, the question is whether they can lawfully retain the 50,000*l.* which has been paid to them.

In negotiating the cancellation agreements Lever Brothers were clearly proceeding on the mistaken footing that they could not determine the service agreements without the consent of the appellants. The appellants (not having in mind their wrongful acts) were proceeding on the same mistaken footing. The foundation or root of the bargain was the assumption made by both parties that the appellants had the right to remain in the saddle under their service agreements for a further period of two and a-half years, and could not be dislodged earlier without their consent. It was solely on that assumption that Lever Brothers agreed to pay, and the appellants agreed to accept, the sum of 50,000*l.*

In these circumstances the contention put forward by counsel for the appellants that, as the service agreements were still in existence, and as what was being negotiated was the termination of those agreements, there was no mutual mistake as to the subject matter of the bargain, but at most only as to some incidental fact not going to the root of the bargain, seems to me to ignore the whole substance of the transaction. If the right of the appellants to remain in office under the service agreements were withdrawn, the foundation of the cancellation agreements would utterly collapse.

Wright J., in a careful judgment, in which he reviews the relevant authorities, has come to the conclusion that the cancellation agreements are void on the ground that the parties dealt with one another under a mutual mistake as to their respective rights. I find myself in entire agreement with this conclusion and with the reasons given by the learned judge for arriving at it.

In my opinion the present case falls within that general class of cases where the subject matter of a contract has been held to be non-existent. I agree with the statement in Pollock on Contracts, 9th ed., p. 530, that in all such cases the question is whether the existence of the thing contracted for or the state of things contemplated was or was not pre-supposed as essential to the agreement. The present is an example of a case where the state of things contemplated was pre-supposed as essential to the agreement. The locus classicus on this particular branch of contract law is the passage in Lord Westbury's speech in *Cooper* v. *Phibbs* (1), where, after pointing out the difference between ignorance of the general law of the country and ignorance of a private right, although the latter might also be the result of a matter

(1) L. R. 2 H. L. 149, 170.

of law, Lord Westbury states the rule where private rights are concerned as follows: "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake." The only criticism to be made on that statement of the rule is that the word "void" ought to have been substituted for the expression "liable to be set aside," as what really happens in such cases is that the agreement fails to become a contract.

The learned judge has referred to a number of cases where this rule has been applied, and I do not think that any useful purpose would be served by going through them again. In none of these cases, however, are the facts precisely on all fours with the facts we have here, but I agree with the learned judge in thinking that the principle stated by Lord Westbury is applicable to the circumstances in the present case, and I cannot usefully add anything to his judgment on this point.

The appellants, however, further contended that the learned judge was not justified in deciding the case on the ground of mutual mistake, as this had not been pleaded. In my opinion this contention ought not to prevail. I am content to assume, without deciding the point, that the plea of mistake in the defence was intended to refer to a mistake on the part of Lever Brothers only. As however all the facts relevant to the question whether there had been a mutual mistake were fully investigated and ascertained at the trial, and the last question to the jury was expressly put by the learned judge in order to elicit whether or not there had been such a mistake, no injustice has been done to the appellants by the decision of the learned judge, and this Court ought not to disturb that decision on a mere technical objection which is devoid of merits.

Moreover, in my judgment unilateral mistake (which was admittedly pleaded) is sufficient to entitle the plaintiffs to uphold the judgment appealed against. If the appellants were under a duty to disclose their private speculations, then, in the absence of such disclosure, the cancellation agreements are void, whether the non-disclosure was due to fraud

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or merely to mistake or accident. In such a case it is immaterial that the appellants refrained from disclosure because they did not appreciate its materiality; it is enough for the plaintiffs to prove that they were in fact induced by reason of the non-disclosure to enter into the bargain, without having to prove that the appellants intended to mislead them. It is plain from the evidence and from the findings of the jury that Lever Brothers were induced to enter into the cancellation agreements because of their ignorance of the misdoings of the appellants, and the only question in dispute on this part of the case is whether the appellants were under a duty to disclose those misdoings to Lever Brothers when negotiating for the cancellation agreements. In this action the appellants admitted their liability to account to the Niger Company for the illicit profit made by them, and have paid the amount of such profits into Court. In view of that admission it became unnecessary at the trial to prove that the profits had been acquired by the appellants in the course of and by means of the position which they held under the service agreements. There is, however, enough evidence to show that the admission was rightly made, and that, had it become necessary, further proof that the profits had been so acquired would have been forthcoming. Being admittedly under a liability to account for the profits, it follows that the appellants were under a duty to disclose the fact that they had acquired the profits. Their clear duty was to keep a record of the profits, to place them where they would be available for the Niger Company, and to make a reasonable and prompt disclosure of the transactions. Their duty in other words was to give full information as to their secret transactions, not merely to answer any questions if and when put to them.

Counsel for the appellants have felt the force of the proposition as above stated, but have strenuously contended that this duty was one which the appellants owed to the Niger Company, and not to Lever Brothers, and that, as the cancellation agreements were negotiated with Lever Brothers, they were under no duty to disclose to them their misdoings as directors of the Niger Company. In my judgment, no valid distinction can be drawn between the duties which the appellants owed under the service agreements to the Niger Company and the duties which they owed under these agreements to Lever Brothers. Lever Brothers were the owners of practically the whole of the share capital of the Niger Company. Their object in procuring the services of the appellants was to reorganize the business of that company and make it more prosperous. With that end in view Lever Brothers agreed that the appellants should be placed in the positions of chairman and vice-chairman of the board of the Niger Company and that they should be given full control of the affairs of that company. In entering into the service agreements Lever Brothers were acting not merely in their own interests as shareholders in the Niger Company, but also in the interests and on behalf of the Niger Company, which adopted the agreements by making the appointments therein stipulated for, and subsequently, when its affairs were more prosperous, bore the cost of the appellants' salaries. The position occupied by the appellants both towards Lever Brothers and towards the Niger Company was one of extreme trust and confidence. The appellants were placed by the Niger Company, at the instance and on the responsibility of Lever Brothers, practically in sole control of the affairs of the Niger Company, and given an entirely free hand. In bargaining with Lever Brothers for the relinquishment of that control no distinction can properly be drawn between Lever Brothers and the Niger Company so far as the duty to make full disclosure is concerned. In negotiating the cancellation agreements, Lever Brothers, besides acting on their own account, were obviously also acting on behalf of the Niger Company, whose servants the appellants were, and when making the bargain that the appellants should give up their offices in the Niger Company for the payment of the 50,000*l.* (whether that sum was going to be paid by Lever Brothers out of their own moneys or was going to be debited against the assets of the Niger Company) it was, in my opinion, the plain duty of the appellants to disclose the fact that they had made and were intending to retain the secret profits which they had acquired in the course and by means of the positions which they then held. Neither *Healey's Case* (1) nor *Ramsden's Case* (2) seems to me to have any bearing on the question now under consideration. Those cases merely decided that a servant dismissed for misconduct is entitled to arrears of salary due to him at the time of dismissal. The statement by Avory J. in the former case that the omission to confess or disclose his own misdoing was not in itself a breach of contract on the part of the servant must, I think, be read in light of the context as meaning that it was not such a breach as would of itself put an end to the contract of service and disentitle the servant to arrears of salary. If it was intended to lay down the general proposition that a servant is under no duty to his employer to disclose his own misconduct, I respectfully disagree with it.

In the result, for the reasons stated, I am of opinion that the appeal should be dismissed with costs.

GREER L.J. The main question arising in this appeal is whether the agreements which have been called for convenience the cancellation agreements were rightly decided not to be binding on the respondents by reason of a mutual mistake of fact.

It was contended for the appellants that the mistake which was in fact made according to the finding of the jury, was not the kind of mistake that can in law be regarded as affecting the validity of the contract. It was said that the only mutual mistakes the law recognizes as affecting the validity of a contract are mistakes as to the existence or the identity of the subject matter, and that the mistake in the present case was not a mistake as to the existence of the subject matter, that is to say, the employment agreements, nor as to their identity. It is undoubtedly strictly true to say that as the employment agreements had not been actually determined, the mistake was not as to their existence. It is also strictly true that the mistake was not as to the identity of the subject matter or the identity of the parties. Both parties were

(1) [1917] 1 K. B. 946.

(2) 35 Com. Cas. 314.

negotiating about the same thing, the existing agreements for the employment of the two defendants. But it is not, in my judgment, the law that the only mutual mistakes that will avoid an agreement are mistakes as to the existence or identity of the subject matter of the contract. I think a mistake as to the fundamental character of the subject matter of the contract is one which, if mutual, the law will regard as rendering the contract void. It is quite true that in nearly all, if not all, the cases in which an agreement has been held void for mutual mistake, the mistake has been one as to the existence of the subject matter or its identity. In *Couturier* v. *Hastie* (1) the mistake was as to the existence of a quantity of corn sold as shipped f.o.b. The corn, as corn, had not ceased to exist. It had become heated, and was sold during the voyage and before the contract, but the subject matter of the sale was not corn simpliciter, but corn shipped f.o.b., and on its way to a port of discharge, and it seems to me true to say that as a particular consignment that could be identified it had ceased to exist. In *Galloway* v. *Galloway* (2) the deed of separation was an agreement to regulate a legal relation which did not exist. So also *Strickland* v. *Turner* (3) and *Scott* v. *Coulson* (4) may be said to be cases of mistake as to the existence of the subject matter of the contract, in the one case a life annuity when, unknown to the parties, the life had ceased to exist, and in the other case a life policy on a life which had, unknown to the parties, ceased to exist. But I see no valid reason why the same principle should not be applied to all mistakes as to the fundamental character of the subject matter of the contract. I agree, subject to qualification, with the opinion expressed in Salmond and Winfield's Law of Contract, 1927 ed., p. 195, in these words: "Error as to the existence of the subject matter of the contract is, however, merely an illustration of the general principle of essential error—the principle, namely, that when the parties to a contract have assumed as its basis and presupposition the existence of a certain fact the law will in proper cases,

(1) 5 H. L. C. 673.
(2) 30 Times L. R. 531.
(3) 7 Ex. 208.
(4) [1903] 2 Ch. 249.

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by way of necessary implication, read into the contract an implied condition . . . . that such fact actually exists." This statement of the law needs to be qualified by saying that the mistake must be as to some fact which affects the fundamental basis of the contract. I think the facts of the present case bring it within the words used by Lord Blackburn (then Blackburn J.) in *Kennedy* v. *Panama Etc. Co.* (1), where he says that the law does not authorize a rescission for innocent misrepresentation or misapprehension (i.e., mistake) "unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration." As Wright J. points out in his judgment, Lord Blackburn calls attention to the difficulty presented by cases involving mistake as a difficulty in every case "to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration."

The case on which the appellants relied most strongly in the argument before us is *Pope and Pearson* v. *Buenos Ayres New Gas Co.* (2), a decision of the Court of Appeal. The mistake as to the meaning of the telegram in that case could not be said to affect the substance of the whole consideration, and therefore it did not make the contract void. It was not a mistake about the subject matter of the contract, but about something collateral. *Cooper* v. *Phibbs* (3) also was a case where the mistake was as to the existence of the subject matter of the contract, i.e., the property rights, which were by mistake believed to belong to the lessor but in fact belonged to the lessee. No case in which the doctrine of fundamental error has been applied to a case where the mistake is as to the essential character of the subject matter was cited to the Court at the hearing, and I know of no such case. But I see no reason why the same rule should not

(1) L. R. 2 Q. B. 580, 587.
(2) 8 Times L. R. 758.
(3) L. R. 2 H. L. 149.

apply to cases founded on such mistakes. If two parties meet and one agrees to purchase from the other a particular horse which neither of them has seen, and both are proved to have dealt with one another, on the assumption that what was being sold was a race-horse, and it turned out to be a butcher's pony, or a cart-horse, I cannot think the buyer would be held to his bargain.

I need not state the facts on which the present appeal turns; they have been fully stated by my Lord and by Wright J. in his lucid and convincing judgment. It is clear that what the parties were bargaining about was the compensation to be paid to enable the defendants to determine their obligations under the existing employment agreements. It is true that the agreements in fact still existed. But what the plaintiffs paid for was the right to determine the agreements, and this they could and would have done had they known the true facts, without agreeing to pay any compensation. I think the evidence and the findings of the jury in the present case, to use Lord Blackburn's words, establish "that there was a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration." I therefore agree with Wright J. that the cancellation agreement was based on the kind of mistake which in law entitles either party to say it is a void agreement.

But the appellants objected to a decision being given on the ground of mutual mistake, because that defence was not pleaded. The question whether mutual mistake was, upon the pleadings, an issue which the judge was entitled to consider is one of some difficulty. It was the evidence of the defendants themselves that they had not in mind their breaches of duty when they made the cancellation agreements that gave rise to the question of mutual mistake. Before the action was tried it would hardly seem probable that the defendants would be able to establish to the satisfaction of the tribunal that they had forgotten all about the transactions in question. If they had not forgotten, the plaintiffs would have been entitled to succeed on the ground of fraudulent

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concealment. After they gave evidence that they had forgotten, or had not in mind, their breaches of duty, the question of mutual mistake would naturally arise. The learned judge put the question as to their state of mind in the third part of question 5, at the express request of Mr. Clement Davies, who appeared for the plaintiffs, and the learned judge consented to put the question not merely on the issue of fraud but also on the issue of mistake. Mr. Pritt, for the defendants, at the time objected to the question, on the ground that there could be only one answer to it, inasmuch as both defendants had stated in their evidence that these transactions were not in their minds at the time of the cancellation agreement, and there had been no evidence to show the contrary. (See Transcript, 20th day, p. 911.) He must, however, have apprehended that the learned judge was going to regard the question of mutual mistake as one to be decided. After the summing-up of the judge and the verdict of the jury, an argument took place as to what should be the judgment on those findings. I think the judge made it quite clear that the question he was going to consider was whether the cancellation agreement ought to be declared void or rescinded on the ground of mutual mistake. (See the discussion as to mutual mistake, pp. 1001 to 1004 of the Transcript, 21st day.) It is quite true that Mr. Pritt contended that mutual mistake was not pleaded, but I doubt whether the defendants ought to be allowed to rely on this, having regard to the fact that their counsel had assented to a question relevant to this issue being asked of the jury, subject only to the objection that it could only be answered in one way. However this may be, I think the statement of claim, so far as it is based on mistake, is sufficiently wide to cover the case of mutual mistake, though it is not entirely satisfactory. The plea of mistake is contained in para. 26: "Alternatively the said agreements and each of them were made and the moneys paid thereunder were paid under a mistake of fact." This mistake of fact so alleged might either be unilateral or bilateral. The plaintiffs might have been asked to say in their particulars whether the mistake was alleged to be unilateral or bilateral, but they were not asked. The only particulars of para. 26 the plaintiffs asked for were particulars of the mistake of fact. No particulars were asked as to whether it was alleged to be a mistake of the plaintiffs only, or a mistake of both plaintiffs and defendants. The plea seems to me, as it stands, somewhat embarrassing, and objection might have been taken to it on that ground before the case came on for trial, but I think it does cover the case of mutual mistake. The defendants had notice that the learned judge so regarded it. No evidence except what was in fact called could have thrown any light on the question the judge had to decide —namely, whether the mistake was of such a character as the law would recognize as putting an end to the contract; and I therefore think that the defendants are not entitled to succeed on the ground that mutual mistake was not pleaded. I think it was covered by the pleadings, and that the plaintiffs have suffered no wrong from the fact that the pleadings might have been considered embarrassing. I therefore think that the judgment below was right on the ground stated by the learned judge, that the cancellation agreement was invalidated by mutual mistake of fact.

There is another ground on which this Court ought to hold that the judgment appealed from ought to be affirmed. Towards the end of his judgment Wright J. indicated that another question involved in the action was whether the defendants could retain the benefit of the agreement notwithstanding the fact that they had failed to disclose to Lever Brothers or the Niger Company the fact that they had had secret dealings in cocoa. He indicated some doubt as to the correctness of Avory J.'s opinion expressed in the case of *Healey* v. *Société Anonyme Française Rubastic* (1) to the effect that a non-disclosure of misconduct by a managing director was not a breach of duty, but the learned judge, as he had decided the other point in favour of the respondents, did not feel it necessary to decide whether they were entitled to judgment on the ground of non-disclosure.

(1) [1917] 1 K. B. 946.

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It does not seem to me open to question that the directors of a company occupy a fiduciary position towards the company, with the result that they cannot retain a benefit they have obtained by an agreement with the company unless they have made full disclosure of all material facts known to them: see *Gluckstein* v. *Barnes.* (1) In that case Lord Halsbury describes the position of directors as "proper guardians and trustees" of their company, and Lord Macnaghten describes them as "sole guardians and protectors" of the company. If this agreement had been made directly between the appellants and the Niger Company, it seems clear that the appellants could not hold the Niger Company to their bargain. The appellants were trusted agents of the Niger Company, and I think they also occupied a fiduciary relation to Lever Brothers, who owned over 99 per cent. of the shares in the Niger Company, and who had secured their appointment as chairman and vice-chairman, and had undertaken liability for their salaries. The Company carried on its business for the benefit of its shareholders, and owed a duty to its shareholders. The position seems to me similar to the one that the Irish Court had to deal with in *King* v. *Anderson* (2), where the agent of a trustee was held to occupy a fiduciary relation to the cestui que trust, and when making a bargain with the cestui que trust was under an obligation to make full disclosure, though he was not the direct agent of the cestui que trust, but only the agent of the trustee. In any event, the cancellation agreement was, I think, made by Lever Brothers not only on behalf of themselves, but also on behalf of the Niger Company, who were necessary parties to an agreement which was to determine the services of the appellants to the Niger Company.

It was said, however, that the Court could not consider this aspect of the case, as it was not pleaded. In my judgment, this is not a good objection. Para. 25 of the statement of claim alleges fraudulent concealment. This was understood by the defendants as involving two allegations,

(1) [1900] A. C. 240.

(2) (1874) Ir. R. 8 Eq. 147.

(1.) that there was a concealment, and (2.) that it was fraudulent, and by para. 17 of the defence they denied that they fraudulently concealed, and they also denied that they concealed at all. The paragraph goes on to say: "If it is intended to allege that the defendants were under any duty of disclosure, such allegation is denied." Then on that pleading issue is joined. The statement of claim states the position of the defendants as chairman and vice-chairman of the Niger Company before and at the time when the cancellation agreement was made. It is sufficient in law to allege the facts which give rise to a legal right of action, and, though sometimes advisable, it is not necessary to state in the pleadings the legal result of those facts. Order XIX., r. 4, provides that every pleading shall contain, and shall contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be. Accordingly, the inference of law to be drawn from those facts need not be stated. I think all the material facts to raise the question of the invalidity of the agreement, or the right to rescind it on the ground of non-disclosure, are sufficiently stated in the statement of claim, and that it is open to the Court to hold that the respondents are not bound by the agreement, and that they are entitled to have it rescinded, not merely on the ground of mutual mistake, but also alternatively on the ground of the failure by the appellants, who were in a fiduciary relation towards Lever Brothers and the Niger Company, to disclose material facts.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Birkbeck, Julius, Edwards & Co.*

Solicitors for respondents: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

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HANNABY *v.* LLAY MAIN COLLIERIES, LIMITED.

Workmen's Compensation—Accident—Death—Riding on Tub in Mine—Statutory Prohibition—" For the purposes of and in connection with the employer's trade or business "—Accident arising out of Employment—Regulation as to Mode of exercising Employment—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 43, *sub-s.* 2—*Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1, *sub-ss.* 1 *and* 2.

Where a workman meets with an accident resulting in death or serious and permanent disablement, when doing a prohibited act for the purposes of and in connection with his employer's business, so as to bring the case within s. 1, sub-s. 2, of the Workmen's Compensation Act, 1925, it is a question of degree and therefore of fact for the county court judge whether the workman was at the time of the accident acting within the scope of his employment so as to entitle him or his dependant to compensation.

So *held* by Lord Hanworth M.R. and Lawrence and Slesser L.JJ.

It is not the case that, since the decision of the House of Lords in *Barnes* v. *Nunnery Colliery Co., Ld.* [1912] A. C. 44, as explained by Lord Dunedin in *Wilsons and Clyde Coal Co.* v. *M'Ferrin* [1926] A. C. 377, 387, the act of a miner in riding in a tub contrary to a statutory prohibition and to the employer's takes him so clearly outside the sphere of his employment that a finding to the contrary by the county court judge must necessarily be set aside.

So *held* by Lawrence and Slesser L.JJ. (Lord Hanworth M.R. dissenting).

APPEAL from an award of the judge of the Wrexham County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

Richard James Hannaby was employed in the respondents' mine as a salvage man and on the night of December 6, 1929, his work was, with two other men, R. H. Rogers and W. C. Davies, to move some pipes on trolleys from the bottom to the top of No. 2 dip. After a first journey in which they brought half the pipes up the dip, he and the two other men proceeded to return to the bottom of the dip, and instead of walking he rode down the incline in a tub while the other two men rode on a timber trolley. In going down the boy who controlled the engine allowed a dangerous acceleration of the speed of the journey with the result that the tub in which Hannaby was riding became derailed and he was killed.

The act of riding on sets or trains of tubs when the haulage was worked by gravity or mechanical power was forbidden by s. 43, sub-s. 2, of the Coal Mines Act, 1911, subject to certain exceptions ; and it was prohibited by the employers, who supplied to each man as he signed on to work a summarized copy of this and other provisions of the Act of 1911. It was admitted that a copy had been supplied to the deceased workman.

The deceased's widow Margaret Hannaby brought arbitration proceedings claiming compensation under the Workmen's Compensation Acts as a dependant of the deceased workman.

The effect of the evidence given at the hearing sufficiently appears in the judgments.

The county court judge found that the deceased workman had due notice of the prohibition against riding in a tub and that, on the evidence of Rogers, they rode down the dip to save time. He did not accept the employers' contention that the deceased in riding in a tub stepped outside the scope of his employment, or that he rode down the slope in a tub merely to save himself the trouble of walking. On the authorities, the question to be decided was whether the regulation broken by the deceased related to the mode in which he did his work or whether its breach took the man outside the sphere of his employment. He found upon the evidence that the regulation prohibiting riding in tubs, when considered in regard to Hannaby's death, related to the mode in which he was to do his work and that its breach did not remove him outside the sphere of his employment. The risk of the accident, originating as it did in the brakes of the engine, was a risk to which workmen were exposed whether they rode on the men-riding trolleys up the incline, as was permitted by the regulations, or whether, contrary to the regulations, they were riding in tubs. He found therefore that the workman's death was a personal injury by accident arising out of and in the course of his employment within s. 1, sub-s. 1, of the Act of 1925, and that the workman in riding in a tub in breach of the statutory regulation was doing an act for the purposes and in connection with the employer's trade or business so as to make s. 1, sub-s. 2, apply. He therefore made an award in favour of the applicant.

The respondents appealed.

Edgar Dale for the appellants. There is no evidence that the accident arose out of and in the course of the employment within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1925, and if not, it was immaterial to consider s. 1, sub-s. 2. The deceased was acting in contravention of a statutory prohibition forbidding riding in tubs. Such an act is of a quality to put him outside the scope of his employment: *Barnes* v. *Nunnery Colliery Co., Ld.* (1); *Herbert* v. *Samuel Fox & Co., Ld.* (2) When the facts are doubtful the question is for the county court judge; but when the facts are clearly all one way and the county court judge decides contrary to them, the Court of Appeal can intervene to correct the decision: *Barnes* v. *Nunnery Colliery Co., Ld.* (1) In no subsequent cases has a workman been treated as acting within the sphere of his employment, when riding in a tub in breach of a regulation. In *Richardson* v. *Denton Colliery Co., Ld.* (3), there was a regular practice for men returning from the night shift to the bottom of the shaft to ride in tubs where possible. In *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (4) it was decided that a shot firer was acting within the sphere of his employment, although acting in breach of a regulation, by returning too soon to the place where the shot had exploded, and that he came within the protection of s. 7 of the Workmen's Compensation Act, 1923 (now s. 1, sub-s. 2, of the Act of 1925). The ground of that decision was that the prohibition only went to the mode in which he did his work. But in that very case the decision in *Barnes* v. *Nunnery Colliery Co., Ld.* (1), is referred to with approval and in particular the passage in Lord Loreburn's judgment where he says (5): "Nor can you deny him compensation on the ground only that he was injured through breaking the rules. But if the

(1) [1912] A. C. 44.
(2) [1916] 1 A. C. 405.
(3) (1913) 6 B. W. C. C. 629.
(4) [1926] A. C. 377.
(5) [1912] A. C. 47.

thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." It follows that *Barnes*' case (1), although decided before s. 7 of the Act of 1923 was passed, is still good law: see also *Davison* v. *Holmside and South Moor Collieries, Ld.* (2)

Cave K.C. and *H. I. Nelson* for the respondent. It is only necessary to prove that the workman when injured was doing something in the course of his employment and that the accident arose out of his employment. If so, it is immaterial, if he is injured seriously or is killed, that he was acting, when injured, in a manner forbidden by statute or by the employers having regard to s. 1, sub-s. 2, of the Act of 1925. That is clearly the result of *M'Ferrin's* case. (3) It is not correct to say that the employer by proving that the workman has acted in breach of a statutory prohibition has discharged the onus of showing that the accident did not arise out of the employment. Here the workman was in the middle of his work as a salvage man, although at the particular time when the accident occurred he was doing his work in the wrong way. A man riding on a man-riding trolley would be exposed to the same risk as that incurred by this man in riding in a tub. It could not be said if he had been riding on a man-riding trolley that the accident did not arise out of and in the course of his employment. The mere fact that he rode in a tub in breach of a prohibition instead of on a man-riding trolley cannot have put him outside the sphere of his employment. The man's only fault was to ride on the wrong sort of vehicle, as in *Edwards* v. *Gwauncaegurwen Colliery Co., Ld.* (4)

[LORD HANWORTH M.R. Here the evidence is that the men-riding trolleys were provided for riding up the dip at the end of the shift, and the men were not entitled to use them at any other time.]

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(1) [1912] A. C. 44.
(2) (1929) 22 B. W. C. C. 51.
(3) [1926] A. C. 377.
(4) (1926) 20 B. W. C. C. 75.

That is so. The fact remains that the salvage men were here proceeding down the dip as quickly as they could for the purpose of their work. The evidence is that they rode instead of walking to save time. The workman was clearly doing something "for the purposes and in connection with his employer's trade or business" so that s. 1, sub-s. 2, applies. Unless then it could be said that he had done something taking him outside the sphere of his employment, his dependant can recover compensation. He must have travelled outside his employment either geographically or by arrogating to himself duties which were not his to perform in order to put himself outside the scope of his employment. When *Barnes* v. *Nunnery Colliery Co., Ld.* (1), was decided, s. 1, sub-s. 2, of the Act of 1925 or the corresponding s. 7 of the Act of 1923 had not been passed. This must be borne in mind in considering the language used in that case.

[LORD HANWORTH M.R. In *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (2) Lord Dunedin treated the principle of that case as still applicable.]

Sect. 1, sub-s. 2, was intended to give the benefit of compensation to dependants when the workman had done something which he ought not. That invites the view that a workman may still be within the sphere of his employment when doing something improper: compare *James* v. *Penderyn Limestone Quarries (Hirwain), Ld.* (3) and *Stokoe* v. *Mickley Coal Co., Ld.* (4)

The question whether the workman was within the scope of his employment is one of degree and of fact and therefore a matter for the county court judge. Here the county court judge has in no way misdirected himself. He has asked himself the right question with all the material cases before him. His finding of fact ought not to be disturbed. There is no ground for saying that whenever a miner rides in a tub in breach of a prohibition he has put himself outside the sphere of his employment.

Edgar Dale in reply. It is true that a breach of a regulation does not necessarily take a man outside the sphere of his

(1) [1912] A. C. 44.
(2) [1926] A. C. 377, 387.
(3) (1926) 20 B. W. C. C. 27.
(4) (1928) 21 B. W. C. C. 70.

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employment. But since *Barnes* v. *Nunnery Colliery Co., Ld.* (1), was decided, the act of a miner in riding in a tub in breach of a prohibition has always been treated as being something entirely outside his employment. The decision in *Edwards* v. *Gwauncaegurwen Colliery Co., Ld.* (2), in favour of the workman turned on the fact that it was the practice to supply a means of riding from the face to pit bottom at the end of the shift and that the employers' man had on this occasion, as on a few others, provided a journey of tubs instead of men-riding trolleys. The men's riding in the tubs could therefore be treated as authorized. *Richardson's* case (3) is of a similar nature, and in no other case but these two has a man travelling in a tub contrary to the statutory prohibition been treated as doing an act within the scope of his employment. *James'* case (4) was on the facts a border-line case, and the finding of the county court judge was therefore decisive. In *Edwards* v. *Ocean Coal Co.* (5) the only question was whether the man had been injured when riding in a tub. It is significant that it was never contended that, if this was so, the accident could be treated as an accident arising out of the employment.

[LAWRENCE L.J. It cannot be right that as a matter of principle every miner by riding in a tub steps outside the sphere of his employment.]

The principle is that when a man is doing something different in kind from what he was employed to do he is outside the Act. There are certain sets of facts which put it beyond doubt that the man was acting outside the scope of his employment, and riding in a tub in breach of a prohibition is one of them : compare *Davison's* case. (6)

[He also referred to *Newton* v. *Guest, Keen & Nettlefolds, Ld.* (7) and *Estler Brothers* v. *Phillips.* (8)]

LORD HANWORTH M.R. This is an appeal from the award of the county court judge in one of those difficult cases

(1) [1912] A. C. 44.
(2) 20 B. W. C. C. 75.
(3) 6 B. W. C. C. 629.
(4) 20 B. W. C. C. 27.
(5) (1929) 22 B. W. C. C. 254.
(6) 22 B. W. C. C. 51.
(7) (1926) 19 B. W. C. C. 119.
(8) (1922) 15 B. W. C. C. 291.

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where there has been a prohibition broken and the question arises whether the workman has done something lying outside the sphere of his employment or has merely committed a breach of some regulation within the sphere of his employment. We are much indebted to counsel on both sides, who have argued this case very well indeed.

By the terms of the Workmen's Compensation Act the workman, in order to succeed, must show that the accident arose out of his employment. Before the Act was amended, first, by the passing of the Act of 1923, and then by the form in which that amendment is embodied in the Consolidating Act of 1925, there arose many times for consideration by the Courts the question what was the effect of a workman's breaking a definite prohibition against certain conduct in the mines. There are, under the Coal Mines Act, 1911, s. 43, 'provisions as to travelling on haulage roads, and by sub-s. 2: ' Where the haulage is worked by gravity or mechanical power, no person shall be allowed to ride on sets or trains of tubs," with certain exceptions. It is worth noticing that this question of riding on trains of tubs is of sufficient importance and also of sufficient danger to have invoked the attention of the legislature.

In the case of *Barnes* v. *Nunnery Colliery Co., Ld.* (1): " A workman proceeding to his work in a colliery rode in an empty tub. This was expressly forbidden, and men were fined for so doing; they often did so ride, but knew that it was forbidden, and never did so when any one in authority could see them, and there was no evidence that the employers had ever permitted or 'winked at' the practice. The workman's head came into contact with the roof, and he was killed." The learned judge who heard the case thought that the risk was one which arose out of his employment, and he made an award in favour of the workman. That was set aside by the Court of Appeal, and the matter went before the House of Lords. The case has always been considered an important one, and the more so because there was a difference of opinion in the Court of Appeal. In the

(1) [1912] A. C. 44; 5 B. W. C. C. 195.

House of Lords Lord Loreburn thought that the question whether or not the workman was prevented from recovering because he had done something which took him outside the sphere of his employment was a question of fact and a question of degree; but he said (1) in a passage which has often been quoted, and which I repeat once again: "Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." Pausing there, it is quite plain that Lord Loreburn contemplated cases in which the conduct of the workman might be treated as putting him outside the range of his service by reason of its resulting in his doing something different in kind from anything he was required to do; and, if that was found to be the case, then the workman could not say that the accident arose out of his employment. Lord Atkinson, Lord Shaw and Lord Mersey took the same view. Lord Mersey said this (2): "When riding in the tub he was not only violating the conditions of his employment, but was engaged in an act quite outside its scope. I find it impossible to say that an accident which results from an act so done can in any proper sense be said to arise out of the employment. He was not doing a permitted act carelessly, but he was doing an act which he was prohibited from doing at all"; and he adds: "The act was, in my view, expressly prohibited, and there were no circumstances which could in any way justify the boy in disregarding the prohibition." Lord Atkinson, after referring to Lord Mersey's judgment, says this (3): "But where all the evidence given before him clearly shows that the injury causing the workman's death was the result of a risk not incidental to the workman's employment, then his finding that the injury did arise out of the employment binds nobody,

(1) [1912] A. C. 47.
(2) [1912] A. C. 51.
(3) [1912] A. C. 48.

because it is a finding made without any evidence to support it and cannot be allowed to stand." Pausing there, I think it is fair to say that, although, as is indicated there and in a number of other cases, this question of prohibition and its effects is a question of degree and a question of fact, yet with regard to certain acts they are of such a fundamentally different nature that they cannot be embraced within the terms of the employment. I think *Barnes* v. *Nunnery Colliery Co., Ld.* (1), must always stand as a case in which the House of Lords decided that in a case where the vital prohibition against riding in tubs has been disregarded the quality of the act is such that it cannot be introduced into the employment of a miner in a mine.

There are two other cases which are referred to; the first is *Richardson* v. *Denton Colliery Co., Ld.* (2) In that case it was proved that there was a regular practice for men returning from the night shift in this particular part of the mine to ride on tubs when they could; and *Barnes* v. *Nunnery Colliery Co., Ld.* (1), was distinguished in consequence of this evidence as to the regular practice, which apparently was a practice not necessarily inconsistent with the statutory prohibition, for, although it is not definitely stated in the case, yet it might be that that practice was consonant with s. 43, sub-s. 2 (*b*), whereby men may be conveyed with the written permission of the manager at the commencement or end of their employment in a train. Cozens-Hardy M.R. in dealing with *Barnes* v. *Nunnery Colliery Co., Ld.* (1), shows the distinction between the two cases when he says (3): "All that differs entirely from the present case, and I think the case comes within the observations of Lord Mersey, who points out that although in the case before him the dependant could not recover by reason of the extra risk taken upon himself by the poor boy, knowing it was wrong, knowing it was prohibited, and knowing he ought not to have done it, that has no application at all where such knowledge is not proved and where, on the contrary, it is proved that the habit has been indulged in

(1) [1912] A. C. 44.
(2) 6 B. W. C. C. 629.
(3) 6 B. W. C. C. 633.

not merely by this one miner but by the whole class of miners for more than twelve months, and, I think, for more than two years." Swinfen Eady L.J. says this (1): "The rule is: 'No person shall ride in any tub except where permitted by the manager or under-looker'"—quoting either from the terms of the prohibition put up in the mine or by way of paraphrase from the section in the Act, and he adds (2): "So giving permission for riding in tubs is contemplated. As to when the permission was given we have the evidence of the colliery manager." So that in that case the employers could not say that this act was so prohibited as to take it outside the sphere of the employment, because there was abundance of evidence to show that the very nature of the employment was such as to include, and had included for a year or two, the practice of the men returning from that part of the mine in tubs.

The next case is *Herbert* v. *Samuel Fox & Co., Ld.* (3) That was a case where a boy was employed to walk in front of a shunting engine, and, instead of walking in front, he rode on the buffers of the front wagon. He knew it was against the rules to do this, and was well aware of the notice posted up to the effect that men found breaking this rule would be dismissed. By some mischance while riding on the buffer he slipped and was injured. Again there was a difference of opinion among the noble Lords who heard that case. Lord Loreburn and Lord Parmoor were in favour of the boy on the principle illustrated by Lord Loreburn in the case of *Barnes* v. *Nunnery Colliery Co., Ld.* (4), but Lord Atkinson, Lord Shaw and Lord Wrenbury took the opposite view. Lord Atkinson in discussing *Barnes* v. *Nunnery Colliery Co., Ld.* (4), deals at some length with a curious view that had been presented as to that case for the purpose of showing that it is still good law, and he says (5): "I concur with the majority of the Court of Appeal in thinking that the present case is governed by the decisions of this House in *Barnes* v. *Nunnery Colliery Co.* (4) and *Plumb* v. *Cobden Flour*

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(1) 6 B. W. C. C. 636.

(2) Ibid. 637.

(3) [1916] 1 A. C. 405; 9 B. W. C. C. 164.

(4) [1912] A. C. 44.

(5) [1916] 1 A. C. 410.

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Mills Co. properly understood (1) The principle laid down in them was, in my view, this, that where a workman meets with an accident while doing something actually outside the sphere of his employment, that accident does not arise, and cannot be held to arise, out of his employment, and that this is so whether he did that act from a desire for amusement, from feelings of fatigue, or to forward the object of his employer"; and a little later, dealing with the evidence and the argument, he says: "On the contrary, it was his duty not to be upon" the buffer. Then Lord Wrenbury says (2): "The judge does not state the law as he understands it and is about to apply it, but says simply 'I find accident arose in course of and out of employment.' In that sentence he is not finding simply a fact; he is finding that from certain facts there results a certain conclusion of law. If there is no evidence to support the finding of fact, or if the facts found do not support the conclusion of law, the decision is appealable"; and once more he repeats: "In my opinion the thing done, irrespective of misconduct, was outside the scope of his employment"; and again he refers to the passage in Lord Loreburn's speech in *Barnes* v. *Nunnery Colliery Co., Ld.* (3), in support of this.

Now those three cases, to my mind, stand for the guidance of Courts who have to deal with this difficult point. I associate myself respectfully with the words of Lord Sterndale M.R., which I think are justified by a consideration of the cases which I have discussed, when he says in *Phillips* v. *Estler Brothers* (4): "I think that all the authorities have recognised that, assuming a prohibition by employers to do an act, it is not every prohibition nor every breach that would make the act outside the employment. There may be breaches which will make the act outside the sphere of the employment. There may be breaches which amount to doing the acts in a wrongful manner, though the act done is within the sphere of the employment." There is the foundation for what I myself have said in subsequent cases, that these questions

(1) [1914] A. C. 62.
(2) [1916] 1 A. C. 419.
(3) [1912] A. C. 44.
(4) (1921) 14 B. W. C. C. 138, 141.

are questions of fact, bearing in mind also the observations which have been made in *Barnes* v. *Nunnery Colliery Co., Ld.* (1), and again repeated in *Herbert* v. *Samuel Fox & Co., Ld.* (2), that it is not enough for the county court judge to say: "I find as a fact"; there must be evidence from which he could find the facts as he found them; and it follows from *Barnes* v. *Nunnery Colliery Co., Ld.* (1), that unless you can find some palliative circumstances, the riding in tubs by a miner is an act of the quality and nature which takes it outside the sphere of his employment.

We now have to consider the amending section in the Act of 1923, which now is found codified in s. 1, sub-s. 2, of the Act of 1925. I agree that the sub-section is by no means easy to construe. It is not easy to understand how, when a statutory prohibition has been broken, the breaking of the statutory prohibition can be done by the workman "for the purposes of and in connection with his employer's trade or business." But I do not pause to criticize the sub-section further. There it is, and we have got to do our best with it and to reconcile sub-ss. 1 and 2 as best we can. A happy illustration of how that can be done is to be found in the combined report of *Wilsons and Clyde Coal Co.* v. *M'Ferrin* and *Kerr or M'Aulay* v. *James Dunlop & Co., Ld.* (3), in both of which a man was injured by a shot going off. In the one case the man went to a shot-hole in the mistaken belief that the shot had exploded without allowing the specified time to elapse, and the charge exploded and he was injured; and in the second case a workman, who had no duty to couple the electric cable to the detonator, went and did so and was injured. In the first case it was held that there was a breach of the prohibition within the sphere of employment, and in the other it was held that there was a breach of a regulation in respect of a matter which in no sense fell within the sphere of employment. Lord Dunedin says this (4): "The result of this section is, in my opinion, not doubtful. It does not

(1) [1912] A. C. 44.

(2) [1916] 1 A. C. 405.

(3) [1926] A. C. 377; 19 B. W. C. C. 1.

(4) [1926] A. C. 386.

either repeal or amend the radical provisions of the principal Act, that the accident to entitle the workman to compensation must arise out of and in the course of his employment, but it does introduce a far-reaching, though artificial, consideration which prevents a certain class of evidence, available to show that the accident did not arise out of the employment, from being any longer in force. Now, to show that an accident did not arise out of the man's employment by means of tabling a prohibition which limited the scope of his employment was not the only way of showing that an accident did not arise out of the employment. A more direct and simpler way, when the facts allowed of it, was to show that what the man was doing was not his employment at all." Then he goes on to quote from *Barnes* v. *Nunnery Colliery Co., Ld.* (1), the words: "But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." That seems to me to show that it no longer follows from the fact that there has been a breach of a prohibition that the sphere of the employment has been exceeded. It must be shown, as I think it was in *Barnes* v. *Nunnery Colliery Co., Ld.* (1), that the prohibition was of such a nature that it was never contemplated by master or servant that a workman committing a breach of it could be within the sphere of his employment, with the result that when the Court comes to consider the matter on appeal it can take the point that there was no evidence that the man was employed to do work involving such a breach at all.

There are two more cases that I wish to refer to. In *James* v. *Penderyn Limestone Quarries (Hirwain), Ld.* (2), a man employed as a shunter rode on a coupling stick stuck into the buffers, and he recovered compensation for a resulting injury, although that act was prohibited. The reason was that it was held that "the prohibition was not one defining the sphere of the man's employment, though as a statutory prohibition it limited it, and the breach of it, apart from the provisions of sect. 1 (2.), would have prevented the accident arising out of the employment." There there was evidence that brought him back into what I will call the compensation provisions by virtue of s. 1, sub-s. 2. But again in that case the passage of Lord Dunedin's speech in *Plumb* v. *Cobden Flour Mills Co.* (1) is referred to, when, after saying that there was abundant evidence on which the county court judge could come to the conclusion at which he had arrived, I refer to the distinction between an act outside the sphere, and not in the contemplation of the employment, and an act which, though done in a particular way in breach of a prohibition, is within the sphere of employment. The next case is *Edwards* v. *Gwauncaegurwen Colliery Co., Ld.* (2) It is suggested that it created some difficulty and altered the law. To my mind it is another illustration of what was found in *Richardson* v. *Denton Colliery Co., Ld.* (3) In *Edwards'* case (2) the county court judge in the arbitration proceedings held "that the act of riding on tubs constituted an added peril, that it being a prohibited act to the knowledge of the workmen was not within the scope of the employment, and therefore sect. 1 (2.) did not apply." There was evidence there that it was necessary for the workmen to be conveyed in tubs in order to enable them to leave the pit within the limit of seven hours permitted for each shift. The employers for this purpose had continuously provided what was called a "spake," a train of special vehicles containing seats. Be it observed that if that provision had not been made the employers would have been responsible for exceeding the time limit. On the occasion when the accident happened the driver, instead of using what was known as the "spake," did what he had sometimes done before and used a train of tubs. It appears to me that the case is easily distinguished upon those facts. The employers were not able to say that this train as provided by their driver was otherwise than a "spake." It ought to have been a "spake" but instead of

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(1) [1912] A. C. 47.

(2) 20 B. W. C. C. 27.

(1) [1914] A. C. 62.

(2) 20 B. W. C. C. 75.

(3) 6 B. W. C. C. 629.

that their own servant had provided, as he did on some other occasions, a train of tubs. It is difficult to suppose therefore that the riding in tubs on this occasion was not permitted, and this is just the case in which sub-s. 2 (*c*) might have been quoted with very considerable effect. Here you have a finding, as you had in *Richardson* v. *Denton Colliery Co., Ld.* (1), that this practice existed. It was contemplated that a train would be provided for them to ride in, whether it was the proper "spake" or a train of tubs; and, therefore, the man was entitled to recover. Thus I said (2): "For the purpose of that egress it is found by the deputy county court judge that the means were provided for their conveyance from work on every day, and on Saturday as well as others; that they had expected, and had a right to expect, that either the spake or a journey of tubs would come along; that an employee at the mine for his own purpose on Saturdays brought out the journey of tubs, instead of the spake, and it appears to me that they disobeyed a regulation—what the character of it was I do not stop to enquire, whether it was statutory, as it appears to be, or one of the orders of the employers, as it would also appear to be, it does not appear to make any difference—they disobeyed that and in disobeying it they were committing a wrong and they were guilty of misconduct in the course of their employment as miners, who as miners had to go to their work, to do their work at the face, and to return from their work by a particular time. Now, in that view it appears to be clear that the prohibition did not circumscribe the sphere of their employment." Therefore to my mind *Edwards* v. *Gwauncaegurwen Colliery Co., Ld.* (3), is in no sense opposed to, and does not cut down or alter the effect of, either *Barnes* v. *Nunnery Colliery Co., Ld.* (4), or *Plumb* v. *Cobden Flour Mills Co.* (5)

There is one more case I have to refer to; that is *Davison* v. *Holmside and South Moor Collieries, Ld.* (6) In *Davison's* case the man "got into a moving tub for the purpose of

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(1) 6 B. W. C. C. 629.
(2) 20 B. W. C. C. 87.
(3) Ibid. 75.
(4) [1912] A. C. 44.
(5) [1914] A. C. 62.
(6) 22 B. W. C. C. 51.

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riding to the person to whom he had to hand over his duties." The county court judge found that this act was not of the same quality as in either *Richardson* v. *Denton Colliery Co., Ld.* (1), or *Edwards* v. *Gwauncaegurwen Colliery Co., Ld.* (2) He found that it was an act which was not within the scope of the workman's employment; and we upheld that decision, because, as I said (3): "It is quite clear from the abundance of authority to which we have been referred that it is a question of degree and, therefore, a question of fact."

I come now to the evidence which was before the county court judge. He has given a careful judgment, but, in my view, there was no evidence on which he could come to the conclusion that the case fell within either *Richardson's* case (1) or *Edwards'* case. (2) It was a case in which the man's act was of the same quality as that of the workman in *Barnes* v. *Nunnery Colliery Co., Ld.* (4) Let me call attention to a few passages in the evidence. Some question arose whether the workman's act in riding on the tub was due to his being pressed for time. That question had arisen in *Edwards'* case (2), but here there is practically no evidence that there was any pressure at all. The salvage men went down the mine at 11.30 P.M. and the shift did not end till 6 o'clock in the morning. The journey train by which they went down the dip normally travels a little quicker than a man walking. The total distance they had to go is certainly not more than 700 yards; it may be even less. These men had gone down and fetched up from No. 2 dip one set of the pipes which they were employed to move and they went down to fetch the remainder on the train. The man who was injured went down in a tub; Rogers and Davis, the two other men, went down riding upon a timber trolley. Rogers had been employed for thirty-nine years in mines, and the evidence which he gave was that this was the "only occasion on which I have ridden on journeys during the whole of that time. I knew I am not entitled to ride on tubs. I know it is dangerous to ride in tubs." Then he states what may not be very material, though the judge refers to it, that he was in fact convicted

(1) 6 B. W. C. C. 629.
(2) 20 B. W. C. C. 75.
(3) 22 B. W. C. C. 65.
(4) [1912] A. C. 44.

of the offence under the Coal Mines Acts; and if there had been any palliation of it that might have made a difference. Of course, we are not bound by the fact that the man was fined, and I only mention it because the judge mentions it in his judgment. I cast that matter entirely on one side. But there was cogent and overwhelming evidence of the known danger of riding in tubs. Mr. Williams, the deputy-foreman, gave evidence, and said on the question of tubs that there was "no particular time for them to do work. None of them was entitled to ride in tubs either up or down." He said he had "not seen men riding tubs in this colliery," and that it was not in fact "done and taken no notice of by management." Mr. Williams also said: "Men-riding trolleys are provided for riding up dip only"—that is never for riding down. "This is confined to the time"—that is the riding up is confined to the time—"when they have finished their shift and are on the way home. . . . . I knew men had ridden down after accident, the night it happened." It appears to me that that evidence is accepted by the county court judge, for he says in his judgment: "Williams' evidence that the men in this colliery were not permitted to ride in tubs was corroborated by Mr. Mottram, the general manager, and I accept their evidence with regard to that."

The matter does not stop there. We have here a circumstance which does not prevail, I think, in any of the other cases. The county court judge says: "Under the Coal Mines Regulation Act riding on sets or trains of tubs where the haulage is worked by mechanical power is prohibited. Summarised copies of this and other provisions of the Act were supplied to each man as he signed on to work at the Llay Main Colliery, and it was admitted by counsel for the applicant that Hannaby had so signed." Consequently the man, who lost his life by riding in a tub, had embodied in the actual signed terms of his employment a summarised notice of the provision of the Act which prohibited his riding in tubs. If and so far as workmen ever rode with permission on a journey at all, the evidence of Mottram and Williams shows that it was only after they had finished their shift.

That being so, what more could the employers do to indicate that riding on tubs was something expressly put outside the sphere of the employment ? I come back then to the words used by Lord Atkinson in *Barnes* v. *Nunnery Colliery Co., Ld.* (1), where he says (2) : " The county court judge is, in such cases as this, the sole judge of fact, and where evidence is given before him upon which he could as a reasonable man find on any issue of fact, his decision must be upheld, but where all the evidence given before him clearly shows that the injury causing the workman's death was the result of a risk not incidental to the workman's employment, then his finding that the injury did arise out of the employment binds nobody, because it is a finding made without any evidence to support it and cannot be allowed to stand." I have most carefully considered the evidence in this case, and I confess that I cannot see any stronger way in which the employers could more definitely remove the possibility of riding in tubs as an incident of the employment than by causing their workmen when engaged to sign terms in which a summarised copy of the provisions of the Act is included.

Then, is there any other evidence which in any way shows any palliation or alteration of that ? The county court judge accepted what Mr. Williams and Mr. Mottram had said, and that being so, the only possible conclusion is that it is only if this had been the last journey up the dip at the end of the shift, as in *Edwards*' case (3), that it would have been possible for the learned judge to have considered that a workman in riding in a tub was acting within the sphere of his employment. But as the workman here was riding in a tub when going down the dip, there is absolutely no evidence making it possible to treat that as within the sphere of the employment. The learned county court judge said in his judgment : " I find as a fact upon the evidence here that the regulation prohibiting riding on tubs, when one comes to deal with it in relation to Hannaby's death, related to the mode in which he was to do his work, and its violation did not remove him

(1) [1912] A. C. 44.

(2) [1912] A. C. 47.

(3) 20 B. W. C. C. 75.

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outside the sphere of his employment. The nature of the work which he was employed to do required him to go down the incline from the top to the bottom of Dip No. 2, and he and his companions rode down in the vehicles instead of walking down, and he thus recklessly and negligently contravened the statute." I only refer to that to show that I have not overlooked it; but to my mind, after seeing what the signed terms between the parties were, one could only come to that conclusion by disregarding the quality which has been attached to the act of riding in tubs by the oft quoted and oft approved authority of *Barnes* v. *Nunnery Colliery Co., Ld.* (1)

To my mind there was no evidence on which the county court judge could find that this act was within the terms of the employment; and the result is that I hold that there was no evidence to bring the workman within s. 1, sub-s. 1, of the statute. No question therefore arises under sub-s. 2. I would only say with regard to sub-s. 2 that the suggestion that the man rode in a tub to save time in this case seems to me of the flimsiest; but as I have not got to consider sub-s. 2, perhaps the less I say about this the better. I hold, for my part, that the principle of *Barnes* v. *Nunnery Colliery Co., Ld.* (1) must be applied, that there was no evidence that this act was something done within the sphere or the terms of the employment, and for that reason, left to myself, I should hold that the appeal ought to be allowed. But as my learned colleagues take a different view, the appeal will be dismissed. I need hardly say that I differ from them with reluctance, but after carefully considering the evidence, I find it so cogent, or, rather, the absence of evidence to support the county court judge's decision so cogent, that I feel bound to give expression to my opinion.

LAWRENCE L.J. In this case I have the misfortune to differ from the conclusion reached by the Master of the Rolls, and need hardly say that in view of his greater experience in these cases I do so with diffidence and with some misgiving as to the correctness of my own opinion.

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(1) [1912] A. C. 44.

In my judgment, however, this appeal fails on the ground that the learned county court judge has not misdirected himself on any point of law, and that there was evidence to support his finding of fact. The question which the learned county court judge had to determine was, whether the workman when he met with his accident had stepped outside the sphere of his employment or whether he was still within that sphere, although acting in contravention of a statutory and employer's prohibition. The answer to those questions, in my opinion, depends upon whether in the circumstances of this case the prohibition against tub riding limited the scope of the workman's employment or merely regulated the mode in which his employment was to be exercised: see per the Master of the Rolls in *Edwards'* case. (1) It is not disputed that the prohibited act was done by the workman for the purpose of and in connection with his employers' trade or business within the meaning of sub-s. 2 of s. 1 of the Act of 1925. But it is, of course, well settled that this fact will not avail the workman if he was not at the time of the accident also acting in the course of his employment within the meaning of sub-s. 1 of that section.

It has been clearly laid down by authorities binding on this Court that the question whether in the circumstances of any particular case the workman was acting in the course of his employment is a question of fact for the county court judge. On this point I need only refer to what was said by the Master of the Rolls in the recent case of *Davison* v. *Holmside and South Moor Collieries, Ld.* (2) In that case the question was whether the workman was acting within the scope of his employment notwithstanding that in contravention of the provisions of s. 43 of the Coal Mines Act, 1911, he had entered and was riding when injured in a tub down the main haulage way of the mine and the Master of the Rolls said: "I do not want to go over the cases again, but it is quite clear from the abundance of authority to which we have been referred that it is a question of degree and, therefore, a question of fact. The learned county court judge has not

(1) 20 B. W. C. C. 87.

(2) 22 B. W. C. C. 51, 65.

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in any way misdirected himself. He has come to a conclusion upon the facts, and that conclusion is binding upon us. This Court cannot in any way set it aside, particularly because we find that he has appreciated the cases and directed himself in accordance with them, and ultimately reached a conclusion of fact which is binding upon this Court."

Mr. Dale in his able argument, however, strenuously contended that in view of the decision in the House of Lords in *Barnes*' case (1), as explained by Lord Dunedin in *M'Ferrin's* case (2), tub riding in a mine contrary to a statutory and an employer's prohibition takes a workman so clearly outside the sphere of his employment that a finding to the contrary must necessarily be set aside. This contention, in my opinion, is based on a misapprehension of the true meaning and effect of Lord Dunedin's remarks about the decision in *Barnes*' case (1) in his speech in *M'Ferrin's* case (2), as was pointed out by Atkin L.J. in *Edwards*' case (3), in which latter case the same argument as we have heard in the present case was unsuccessfully addressed to this Court. The decision in *Edwards*' case (3), which is binding on us, in my opinion lays down the principle upon which the present case ought to be decided and affords a complete answer to Mr. Dale's argument. The Master of the Rolls in that case, after reviewing the earlier decisions, and after referring particularly to *Barnes*' case (1); *Plumb's* case (4); and *Lancashire and Yorkshire Ry. Co.* v. *Highley* (5) said: "Those cases had dealt with the problem that arose in what I will call the pre-section 7 days as to what was the scope of a workman's employment; and could he be said to be acting within the scope of his employment when he was acting in disobedience to some statutory or other regulation or order of his master which definitely prohibited him from doing the act which he was doing at the time of the accident?" The Master of the Rolls then dealt more in detail with what Lord Dunedin said in *Plumb's* case (6), when approving of the way in which

(1) [1912] A. C. 44.
(2) [1926] A. C. 377.
(3) 20 B. W. C. C. 75, 92–94.
(4) [1914] A. C. 62.
(5) [1917] A. C. 352.
(6) [1914] A. C. 66.

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Collins L.J. had stated the problem in *Whitehead* v. *Reader* (1) —namely, "Did the order which was disobeyed limit the sphere of the employment, or was it merely a direction not to do certain things, or to do them in a certain way within the sphere of the employment?" In this connection the Master of the Rolls quotes what Lord Dunedin said (2)—namely, "There are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere." The Master of the Rolls then said (3): "It appears clear that this new s. 7 of the Act of 1923 was intended to deal with the very problem which had been so precisely enunciated in the case of *Plumb* v. *Cobden Flour Mills Co.* (4), and under that section a man may still be deemed to be within his employment, even though he has acted contrary to a statutory prohibition or regulation or rule, if what he has done has been done for the purposes of and in connection with his employer's trade or business." Then the Master of the Rolls dealt with the cases subsequent to s. 7 in this way: "Now, dealing with the cases subsequent to s. 7, *Davies* v. *Gwauncaegurwen Colliery Co.* (5); *Kerr or M'Aulay* v. *James Dunlop & Co., Ld.* (6); and *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (6), I think we get this established, that first under the statutes as they then were, or the statute as it is now of 1925, the workman first of all has to bring himself within the primary words of sub-s. 1 of s. 1, but he may fail because he was acting in disobedience of a statutory prohibition or regulation or rule or order. If that disobedience was to a regulation of his conduct in the sphere of his employment he can be brought back into the benefit of sub-s. 1 if he was acting in the course of and for the purposes of and in connection with his employer's trade or business. But if the conduct was one which took him right outside the sphere of his employment altogether, he fails, not because he is not brought within sub-s. 2, but because he is not within sub-s. 1 of s. 1 of the Act of 1925, and we have in the cases of *Davies* (1) and *M'Ferrin* (2), and *Kerr or M'Aulay* (2) illustrations which enable us to fix what is the limit and demarcation to be applied." That latter statement, I think, has reference both to the illustrations which were given in those cases and to the illustrations which those cases themselves afford. The Master of the Rolls then reviewed the particular facts of *Edwards*' case, as to which I shall have to say a few words presently, and in the result he came to the conclusion that the prohibition did not circumscribe the sphere of the workmen's employment but regulated the mode in which their employment should be exercised, and therefore that they had a right to rely on sub-s. 2 of s. 1 and to say that although there had been a breach by them of the regulation yet the accident ought to be deemed to arise out of and in the course of their employment, thus bringing them back into the benefit of sub-s. 1 notwithstanding that the accident had happened whilst they were committing a breach of the regulation. Now it is to be borne in mind that in that case the Court was dealing with the same statutory prohibition with which the Court is dealing in the present case, and that the county court judge was held by this Court to be wrong in law in deciding that the breach of the statutory prohibition had taken the workmen out of the sphere of their employment. Atkin L.J. in agreeing with the judgment of the Master of the Rolls goes more into detail in distinguishing the earlier cases and the argument founded upon what Lord Dunedin said in *M'Ferrin's* case (2) in reference to the decision in *Barnes*' case. (3) I will not read the whole of the relevant passages of his judgment (4), but he introduces his remarks on that subject by saying : " We have had an argument addressed to us, and which is addressed to us now

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(1) [1901] 2 K. B. 48.
(2) [1914] A. C. 67.
(3) 20 B. W. C. C. 75, 85.
(4) [1914] A. C. 62.
(5) [1924] 2 K. B. 651.
(6) [1926] A. C. 377.

(1) [1924] 2 K. B. 651.
(2) [1926] A. C. 377.
(3) [1912] A. C. 44.
(4) 20 B. W. C. C. 92–94.

in most cases within the section which is based upon the decision of *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (1)," and then proceeds to deal with that argument and points out that the workman may take himself out of the sphere of his employment by arrogating to himself duties which he was never asked to perform and of a kind differing from those which he was asked to perform, " as where Lord Dunedin said a fireman takes upon himself the duties of a shot firer, or where, in the last case in the House of Lords, a miner, who was engaged as a shot firer, assumed to himself the duties of the fireman whose duty it was to switch on the electric current, or, as in the case which has not yet arisen but which might arise, where a porter assumes the duty of an engine driver, and acts possibly in breach of regulations which applied specially to engine drivers." Then he says (2): " It is in stating those simple principles that Lord Dunedin used the language in the case I have referred to: *Wilsons and Clyde Coal Co.* v. *M'Ferrin*." (1) Then, after quoting the passage which gives rise to the difficulty, Atkin L.J. says (2): " It seems to me that those words are capable unfortunately of being misunderstood, although it is very difficult to see why they should be. But over and over again, after citing those words, the contention is that you may now refer back to the old cases before the Act, by way of adopting another and a simpler way of showing what the man was doing was not his employment at all; and it is done by referring to the cases before the Act of 1923, where there was a statutory prohibition, and where the judges said: 'Because you were acting in breach of the prohibition you were plainly acting outside the scope of your employment.' Then it is said because those cases hold the act done in breach of the prohibition was outside the scope of your employment you can come back, as Lord Dunedin says, and assume that act was still outside the scope of the employment, and therefore Lord Dunedin's words apply. That is a complete misapprehension. You have still got to distinguish between the different classes of cases. An act may have been held to be

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(1) [1926] A. C. 377.

(2) 20 B. W. C. C. 93.

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outside the scope of the employment when it was in breach of a prohibition, but by the section it was brought within the scope of the employment. On the other hand, there may be cases where the act done was of such a different nature to that which was required of you that you had stepped out of one employment into another employment, and then whether it was in breach of a prohibition or not did not matter," and he points out that that is made clear by referring to *A. G. Moore & Co.* v. *Donnelly* (1); *M'Ferrin's* case (2); and *Fife Coal Co.* v. *Sharp or Colville* (1), then he proceeds (3): "Therefore, what you have got to consider in these cases is whether the act done was an act of a different class, or a different kind, to that which was required or expected from you under the employment, or whether, as Lord Dunedin says, the workman has arrogated to himself duties which he was neither engaged nor was entitled to perform."

Now it is true that in *Edwards*' case (4) the facts differed from the facts in the present case in two respects. The first difference is that the men in that case were on their way from the coal face to the bottom of the shaft after having completed their work for the day, and it was contended that they entered the tub train not for the purposes of and in connection with their employers' trade or business, but for their own purposes—namely, to get out of the mine. That contention was negatived on the ground that it was one of the terms of their employment that they should come out of the mine at or within a specified time, and that being so, the workman in proceeding towards the surface were acting for the purposes of and in connection with the employers' trade or business. No such question arises here, the present is an à fortiori case, as the workman met with his accident during working hours whilst descending dip No. 2 in the course of performing his duty under the terms of his employment. The second difference is that in *Edwards*' case (4), the workmen for the purpose of getting out of the mine were

(1) [1921] 1 A. C. 329.
(2) [1926] A. C. 377.
(3) 20 B. W. C. C. 95.
(4) 20 B. W. C. C. 75.

required or expected to use a spake provided by the employers. On the day in question, however, the rider had substituted for the spake a journey of tubs the riding in which came under the statutory prohibition. That difference between *Edwards'* case (1) and the present case is in my opinion a difference only in the degree in which the statutory prohibition against tub riding may operate to regulate the mode in which the employment of the workman was to be exercised. It leaves untouched the principle that a statutory prohibition against tub riding in a mine does not necessarily take a workman out of the sphere of his employment, but may (as it was held in that case to be) be merely a prohibition regulating the mode of exercising the employment. The test laid down by *Edwards'* case (1) is in my opinion plain and ought to be applied in the present and every similar case; has the workman in disobeying the prohibition stepped from the sphere of his employment into some other sphere of employment which he was neither engaged nor entitled to perform, in other words has he engaged in some job or arrogated to himself some duty which did not come within the scope of his employment; or has he, whilst remaining within the scope of his employment, acted in contravention of a prohibition which regulated the mode in which he should exercise his employment? That, as stated by the Master of the Rolls in *Davison's* case (2) is a question of fact in each case.

Now if that be the true view, it brings me to the question whether in the present case there was any evidence upon which the learned county court judge could arrive at the finding that the workman was acting in the course of his employment when he descended dip No. 2 in a tub contrary to a statutory and an employers' prohibition, a finding which involves the further finding that in the circumstances of the present case the prohibition was one regulating the mode in which the workman was to perform the duties of his employment. The evidence establishes that the workman was a salvage man who was employed with other salvage men to move mining

(1) 20 B. W. C. C. 75. (2) 22 B. W. C. C. 51.

equipment from one part of the mine to another, as and when required. At the time when the accident occurred the workman was engaged in the task of moving twenty-six pipes from the bottom of dip No. 2 to the top of that dip. In pursuance of that task half the pipes had been brought to the top of the dip and the workman's duty was then to go down the dip in order to assist in fetching up the remaining half. Instead of walking down the dip, as he ought to have done, he got into an empty tub attached to the timber trolley, which was descending the dip for the purpose of bringing up the remaining thirteen pipes. This was in contravention of the statutory regulation and contrary to the orders of his employers. The county court judge has found that he got into the tub to save time in the performance of his job. Whether that be material or not I do not pause to consider. It is quite obvious that for some reason or other he got into the tub solely in order to do that which it was his duty to do—namely, to get to the bottom of the dip for the purpose of continuing the task upon which he was then engaged under the terms of his employment. In these circumstances I am of opinion that there was ample evidence upon which the county court judge could find; and further (though this is immaterial) I think that he was right in finding as a fact that in disobeying the prohibition against riding down the dip in a tub the workman had not stepped outside the sphere of his employment. He had not arrogated to himself any duty which he had not been employed to perform, but was actually performing the duty for which he was employed, although in a manner contrary to that in which he ought to have performed it; consequently by riding down the dip instead of walking he contravened a prohibition regulating the mode in which he should exercise his employment.

In the result for the reasons stated I am of opinion that the learned county court judge did not misdirect himself on any point of law, and that his finding of fact cannot be disturbed. In my judgment therefore the appeal ought to be dismissed with costs.

SLESSER L.J. In this case the deceased workman was a salvage man in a mine. His work consisted in getting materials such as pipes, girders and rails out of places which had been finished. This work on the day of the accident, according to the finding of the learned county court judge, required the workman, among other duties, to go down a subterranean incline from the top to the bottom in order to bring back from the bottom some pipes. They were to be brought up in two journeys. On the occasion of the first descent on the night when the workman was killed, the deceased went down in a safely constructed car known as a man-riding trolley. On the occasion of the second descent, the men-riding trolleys having been left at the bottom on the first descent, the men again rode down, two other men on a timber not a men-riding trolley, but the deceased man, Hannaby, in a tub. Mr. Rogers, one of the workmen whose evidence is accepted by the learned judge, states that the object of so riding down rather than walking was to save time. The boy who controls the engine appears to have taken his foot off the engine brakes which controlled the rope attached to the journey, and there was, consequently, a dangerous acceleration in the speed of the journey which caused the tub in which the deceased was riding to become derailed and to crash against a girder, whereby it is found the deceased was killed. The exact manner of his death was not completely known.

The learned judge has found that the deceased at the time was going down the incline in the vehicle for the purpose of moving and loading the pipes, though he was doing it in an improper way, for he must have known it was contrary to the regulations to ride in the tub. There is no express finding that it would have been contrary to orders to ride down as distinguished from riding up in a man-riding trolley. The manager says he has never known the men so going down, but he says he cannot answer the question whether any question has ever been raised as to men going down in man-riding trolleys. The Coal Mines Act, 1911, s. 43, sub-s. 2, is limited to a prohibition with regard to the use of sets of trains of tubs.

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I have set out these facts, because on them it is contended by the appellant that the learned judge was wrong in finding for the widow of the deceased. All the relevant authorities were cited to the learned judge, and it is not seriously suggested that his statement of the law applicable to such cases is incorrect; but it is argued that the evidence was all one way and that he was wrong in law in the absence of all evidence in finding that the accident arose out of the employment. It is now clear beyond question that, if the workman is injured or killed by an accident caused by an act done in such a way as to take it outside the scope of his employment, the workman cannot recover; and that in such circumstances sub-s. 2 of s. 1 of the Act of 1925 which otherwise may save the workman's claim from being defeated where he has done a prohibited act, will not bring back the accident within the sphere of the employment for which the employer is responsible: see the leading case in the House of Lords of *Wilsons and Clyde Coal Co., Ld.* v. *M'Ferrin* (1) and the many authorities which have followed that decision.

It is said by Mr. Dale that in the present case the evidence and the authorities should have led the judge of necessity to find that the act of improperly riding in the tub did so bring the accident into a sphere different in kind from anything the workman was required or entitled to do that it could not properly be held that it arose out of the employment. On the other hand, Mr. Cave contends that the determination was one of degree and of fact for the learned county court judge, and that there was at least some evidence either way on which he could properly come to a conclusion. There is no question but that, if there be evidence, it is for the judge to decide whether the act is or is not within the sphere of the employment however irregularly or improperly the act is done. Mr. Dale, faced with a finding of fact that the regulation prohibiting riding on tubs related to the mode in which the deceased was to do his work and that its violation did not remove him outside the sphere of the employment, relies principally [upon the case of *Barnes* v. *Nunnery Colliery*

(1) [1926] A. C. 377.

Co., Ld. (1) In that case a youth, in order to reach the place where he worked, got into an empty tub to ride there and was killed. The act of riding in the tub was expressly forbidden and prohibited by statute. The learned county court judge found that he rode in the tub for the object of his employers and found in favour of the defendants. The Court of Appeal, by a majority, reversed this finding, and the House of Lords affirmed the Court of Appeal. This case, says Mr. Dale, therefore, shows that the mere fact of doing the act for the object of the employer does not excuse the prohibited riding in the tub which was held to take the act out of the scope of the employment.

Now it cannot be disputed that since the Act of 1925, the fact that an act is done in contravention of a statutory or other regulation, or in face of a prohibition, if done for the purposes of and in connection with the employers' trade or business, does not disentitle the workman to recover, if the act, apart from such regulation or prohibition, is within the scope of his employment. There is a passage to that effect in terms by Greer L.J. in *Davison's* case. (2) It is therefore very important to examine the case of *Barnes* (3) most closely in order to see whether the decision there, that the act was altogether outside the employment, was or was not based upon the prohibition, as distinguished from a finding that the act done was necessarily different in kind from the employment because tubs were used. It must always be remembered that at the time when *Barnes* v. *Nunnery Colliery Co., Ld.* (3), was before the Court of Appeal and the House of Lords a distinction between an act different in kind and an act outside the sphere of the employment by reason of a prohibition had not reached that stage of vital importance which has been created by the passing of s. 7 of the Act of 1923 and s. 1, sub-s. 2, of the Act of 1925. So far as the Court of Appeal is concerned, there is no doubt in my mind that Cozens-Hardy M.R. based his finding on the prohibition.

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(1) 4 B. W. C. C. 43 in C. A.; [1912] A. C. 44 and 5 B. W. C. C. 195 in H. L.

(2) 22 B. W. C. C. 51, 69.

(3) 4 B. W. C. C. 43; [1912] A. C. 44.

He says (1): "He [the workman] had no right to get in this tub; it was expressly forbidden, and was a distinct act outside his employment." In the House of Lords, Lord Loreburn, it is true, laid down a general principle as follows (2): "Nor can you deny him compensation on the ground only that he was injured through breaking rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." It is also true that Lord Dunedin in the *Wilsons and Clyde Coal Co.'s* case (3) quotes a dictum of his own in *Plumb's* case (4) which is now generally accepted law, that the two limbs of Lord Loreburn's proposition may be read disjunctively so as to substitute the word "or" for the word "also"; but, nevertheless, though this is now accepted as law as a general proposition, it does not necessarily follow that the Lord Chancellor in *Barnes*' case (5), though laying down the wider proposition of law that acts either prohibited or different in kind would take the act out of the sphere of employment, was in fact saying that in the particular circumstances of that case the youth was doing anything different in kind from his employment except because of the undisputed prohibition, for in terms he continues (2): "I mean that I should say so if I were a judge of the fact, for it is purely a question of fact . . . . the Court of Appeal has by a majority come to the view, for such it is in effect, that there was no evidence, and your Lordships take the same view. I am not prepared to differ." As I have already pointed out, in my view, the Court of Appeal overruled the learned judge on the ground that the riding in the tub was a prohibited act. It remains to add that in the House of Lords Lord Mersey takes the same view and says (6): "He was not doing a permitted act carelessly, but he was doing an act which he was prohibited from doing at all." I read the judgment of Atkin L.J.

(1) 4 B. W. C. C. 47.
(2) [1912] A. C. 47.
(3) [1926] A. C. 377, 387.
(4) [1914] A. C. 62, 67.
(5) [1912] A. C. 44.
(6) [1912] A. C. 51.

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in *Edwards*' case (1), when he refers to *Plumb's* case (2) and the other similar pre-section 7 cases, as they have sometimes been called, to the effect that he also took the view that they were founded at the time primarily upon prohibition. Then it appears from *Richardson* v. *Denton Colliery Co., Ld.* (3), that circumstances may exist where, although a man is killed by riding in a tub, the accident may arise out of the employment, and in that case *Barnes* v. *Nunnery Colliery Co., Ld.* (4), was distinguished. But it is important to observe that Cozens-Hardy M.R. does appear to take the view (5) that *Barnes* v. *Nunnery Colliery Co., Ld.* (4), proceeded upon the fact that the act of the boy in riding in the tub was different from that for which he was employed, and that the decision there was based upon the fact that he was doing a prohibited act, for Lord Cozens-Hardy said, speaking of *Barnes*' case (4): "There it was found as a fact that the boy who was killed knew that what he was doing was contrary to the rules, and knew it was prohibited and prevented whenever possible." All that differs entirely from the present case. In my view, if *Barnes* v. *Nunnery Colliery Co., Ld.* (4), had gone to the length which Mr. Dale contends, that there is something in the quality of riding in a tub which of necessity makes it different in kind from the employment of a miner, *Richardson* v. *Denton Colliery Co., Ld.* (5), ought to have been decided differently from what it was; though, of course, if the earlier case were based on prohibition, the question of acquiescence then explains the difference in treatment. Similarly in *Edwards* v. *Gwauncaegurwen Colliery Co., Ld.* (1), to which both my Lords have referred, although that case was decided after the new sub-section dealing with prohibition had been passed, so far as regards this question of sphere of employment, if the argument for which Mr. Dale contends were correct, that case also would have been contrary to the decision in *Barnes* v. *Nunnery Colliery Co., Ld.* (4) Both those cases, in my view, therefore—*Richardson's* case (1) and *Edwards'* case (2)—which are binding upon us, show that the decision in *Barnes'* case (3) cannot be treated as having fixed that overwhelming test of absence from the sphere of employment for which Mr. Dale argues.

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(1) 20 B. W. C. C. 75.
(2) [1914] A. C. 62, 67.
(3) 6 B. W. C. C. 629.
(4) [1912] A. C. 44.
(5) 6 B. W. C. C. 629, 633.

Now in the present case the learned judge has found in favour of the workman. It is not a question whether we should have come to the same conclusion that the work which involved riding in the tub was or was not work within the sphere of the employment though done by a forbidden mode. Having satisfied myself that under the authority of *Edwards'* case (2) it is open to us to consider whether there be evidence or not, and that the mere fact of riding in a tub as such does not exclude any further inquiry, I propose to consider whether there was any evidence on which the learned judge could so find. There is evidence that salvage men are required to get material out of all places where it is left in the mine, and, as I have already said, in my view there is no express evidence or finding that riding down the dip on man-riding trolleys was forbidden, although it was said by Mr. Mottram, the manager, in cross-examination that he had never known men so to go down. In his judgment the learned judge says: "There was a risk to which these workmen were exposed whether they were riding on the man-riding trolleys up the incline consistently with regulations, whether they were riding down the incline on timber or man-riding trolleys or whether they were, contrary to regulation, riding down the incline in tubs." This seems to indicate that the learned judge left the question of riding down the incline on man-riding trolleys in a neutral position, finding neither that it was expressly permitted nor that it was expressly forbidden. Indeed, no other view can be taken if Mr. Mottram's evidence can be accepted, because he himself said that no question of the kind had ever arisen. If that be so, then, as it seems to me, the only distinction between descending in a tub and descending in a man-riding trolley is the presence of the

(1) 6 B. W. C. C. 629, 633.
(2) 20 B. W. C. C. 75.
(3) [1912] A. C. 44.

statutory and the employers' prohibition. I do not think Mr. Dale would have argued that had the man been killed in descending in a man-riding trolley as distinguished from a tub that it was not at most an improper mode of doing that which was within his employment. But when once the view is arrived at that the test is whether the vehicle in which the man descends is a tub which is prohibited, or a man-riding trolley, which certainly is not expressly permitted but as to which there seems to be no regulation by the employers and certainly no statutory regulation prohibiting it, then the matter becomes entirely one of prohibition and prohibition only. That being so, and there being evidence on which the learned judge could find that the matter came within sub-s. 1 and was within the sphere of his employment, I think that there was evidence on which the learned judge was entitled to find that what was done was done by the workman for the purposes of, and in connection with, his employers' trade or business. He accepts the evidence of Mr. Rogers that the men were travelling down in the vehicles to save time, that is, to save the employers' time. Really no argument on this head has seriously been addressed to us. The issue has been, and has been only whether this improper act was an act within or without the sphere of the employment, and, if the former, whether it was an improper mode of doing that for which the workman was employed. I think it was found as a fact that the deceased used an improper means of doing that for which the workman was employed; it was a prohibited act, or an act done in contravention of an order given by the employers or done without the instructions of the employers within sub-s. 2 of s. 1 of the Act of 1925 but not outside the sphere of the employment; and as, in such circumstances, it is provided that where the accident results in the death of a workman, it shall be deemed to arise out of and in the course of the employment, the learned county court judge, in my view, on sufficient evidence before him has rightly so deemed it to arise out of and in the course of the employment.

I think, therefore, that his finding should not be disturbed, and I agree with Lawrence L.J. that this appeal should be dismissed.

Solicitors: *Calder Woods & Sandiford, for F. E. Metcalfe, Bristol; Jaques & Co., for Cyril Jones & Williams, Wrexham.*

H. C. G.

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SIVIOUR *v.* NAPOLITANO.

Criminal Law—Using Premises for immoral Purposes—Alleged User of upper Floor by Sub-lessee for habitual Prostitution—Liability of Lessee of whole House for permitting such User—"Lessee" of Premises—Criminal Law Amendment Act, 1885 (48 & 49 *Vict.* c. 69), *s.* 13, *sub-s.* 2.

The defendant was and had been for about seven years the lessee of premises consisting of four floors and a basement. He used the ground floor and basement as a shop in which he carried on the business of a tailor. He sub-let unfurnished the first and second floors respectively as flats to two women. These flats were approached not through the shop but by a separate entrance, and apart from his position as landlord the defendant had no right to enter them and did not occupy them. It was stated by the police that the women were known to them as prostitutes, each of whom took men to her own flat. The defendant was charged for that he being the lessee of the premises unlawfully and knowingly permitted part of them—namely, the first and second floors—to be used for the purposes of habitual prostitution contrary to the Criminal Law Amendment Act, 1885, s. 13, sub-s. 2:—

Held, by the Divisional Court, affirming the decision of the magistrate, that the defendant was not the "lessee" of the flats within the meaning of the sub-section and that the charge should be dismissed.

CASE stated by a metropolitan police magistrate.

At the Marlborough Street police court an information was preferred by the now appellant, Police-Sergeant Siviour, on behalf of the Corporation of the City of Westminster, against the now respondent F. P. Napolitano, for that he, being the lessee of the premises No. 7 Kingly Street, unlawfully and knowingly permitted part of these premises, to wit the first and second floors, to be used for the purposes of habitual prostitution.

On May 24 and June 6 and 12, 1930, the information was heard by the magistrate.

At the hearing of the information the following facts were proved or admitted: The respondent was the lessee of the whole of the premises 7 Kingly Street, and had held the lease for some seven years. The premises consisted of a shop and three floors above. The respondent carried on a tailor's business on the ground floor and basement. Two upper floors, which were approached by a separate entrance and not through the shop, were respectively sub-let by the respondent unfurnished as flats to two women. Apart from his position as landlord the respondent had no right to enter the flats and did not occupy them. Observation upon the premises was kept by the police, who stated that the two tenants were known to them as prostitutes and took men to their respective flats, but that no women other than the two tenants used the premises and their user was confined by each to her own flat.

It was contended by the appellant that as lessee of the whole of the premises the respondent was liable under the Criminal Law Amendment Act, 1885, s. 13, sub-s. 2 (1), subject to knowledge of the immoral use to which the tenants were putting the premises occupied by them being established.

It was contended on behalf of the respondent that the respondent was not a lessee within the meaning of the sub-section.

The magistrate was of opinion that even if the premises were used for the purpose of habitual prostitution, and the respondent knowingly permitted it, he was not guilty of the offence; that only those who had immediate control of the premises were responsible; that "lessee" in the sub-section must be construed as ejusdem generis with tenant and occupier and was probably inserted ex abundanti cautela to include a tenant for a longer term than three years; that the fact that the respondent held as lessee of a third party was irrelevant, and he was no more liable on that account than if he had been the freeholder; and that s. 13, sub-s. 3, alone dealt with permission by a landlord of immorality by his tenant, that being the relation in the present case; that it was true that that sub-section did not apply, except where the prostitution constituted the premises a brothel, but that he did not feel justified in so far stretching sub-s. 2 as to include such a casus omissus; and he therefore, without calling upon the respondent for his defence on the merits, dismissed the charge.

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(1) Criminal Law Amendment Act, 1885. Sect. 13: "Any person who—

"(2.) being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution; or

"(3.) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel,

shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable . . . ."

Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20). Sect. 4 "(1.) Section thirteen of the Criminal Law Amendment Act, 1885, shall, so far as it relates to brothels, be amended by inserting after the word 'occupier' the words 'or person in charge.'"

Croom-Johnson K.C. and *E. C. Fulton* for the appellant. The respondent was guilty of the offence with which he was charged. He was "lessee" of the premises which were used for the purposes of habitual prostitution under the Criminal Law Amendment Act, 1885, s. 13, sub-s. 2. That term, as there used, is to be understood in its ordinary sense as meaning the person to whom the premises are let, which or part of which are used for these purposes. The magistrate was wrong in considering that the term included only the person having immediate control of the premises. There is nothing in the sub-section or in the Act to show that it is to be so restricted. The Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20), s. 4, sub-s. 1, in providing that s. 13 of the Act of 1885 shall be amended by adding the words "person in charge," expressly states that it is to be so amended only in so far as it relates to brothels: see Stone's Justices' Manual, 62nd ed., p. 1740; and neither of the flats now in question was a brothel, that term being inapplicable to premises used by one woman only, for purposes of prostitution: *Singleton* v. *Ellison* (1) and *Caldwell* v. *Leech*. (2) Nor was the magistrate right in regarding himself as bound by the ejusdem generis rule to construe the term "lessee" as similar to the terms "tenant" and "occupier," which also occur in s. 13, sub-s. 2; because that rule only directs that where several particular words are associated with general words nothing can come within the general words unless it is similar to the things particularly enumerated, and in sub-s. 2 there are no general words, but only several particular words, each of which must be construed independently of the others. In Mead and Bodkin on the Criminal Law Amendment Act, 1885, 3rd ed., p. 94, it is stated that s. 13, sub-s. 2, is very sweeping in its terms, and would include the case of an occupier of a house sub-letting even one room to a prostitute to be used solely by her in pursuing her avocation. The fact that the respondent was lessee to a third party of the house as a whole was not irrelevant. If he as lessee of the house had allowed the occupants of these two flats to use them rent free for the purposes of habitual prostitution he would clearly have been liable as lessee for the offence with which he is charged, and he cannot be less liable merely by reason of his having granted sub-leases of the flats to these persons. Otherwise, the lessee of a house who allowed a person to use a flat for these purposes could at any time defeat the Act and escape liability by demising the flat to its occupant. The fact that the respondent was a lessor of the two flats did not prevent him from being also a lessee within the meaning of the sub-section, since the same person may be both the lessee of premises as regards the person who has granted him a lease of them, and a lessor as regards a person to whom he has granted a lease of them. Further, there was evidence to show that the respondent knowingly permitted the flats to be used in the manner alleged, because as lessee of the house he must have known of the use which was being made of the flats and was in a position to prevent it, yet he took no steps to do so. Unless the respondent can be convicted of the offence with which he is charged, he cannot be convicted of any offence under s. 13. As the premises were not a brothel he could not be charged either under sub-s. 2 with knowingly permitting the premises to be used as a brothel, or under sub-s. 3 with letting them knowing that they were to be used as a brothel.

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(1) [1895] 1 Q. B. 607.

(2) (1913) 77 J. P. 254.

J. C. Maude for the respondent. The charge against the respondent was rightly dismissed by the magistrate. The respondent was not the "lessee" within the meaning of the Criminal Law Amendment Act, 1885, s. 13, sub-s. 2, of the premises—namely, the first and second floors of the house, which are said to have been used for the purposes of habitual prostitution. The sub-section refers definitely to any person who, being "the" tenant, lessee, or occupier of premises, permits them to be used for the purposes of habitual prostitution, and the magistrate properly construed it as applying only to the person who has the immediate control of the premises. It corresponds to sub-s. 3, which refers definitely to a person being "the" lessor or landlord of premises let as a brothel, and applies to a person whose interest in the premises may not give him the immediate control of them. The Legislature could easily have introduced into sub-s. 2 the word "lessor" or "landlord," and the fact that it has not done so shows clearly that it did not intend that the person occupying that position should be liable under that sub-section, but only the person whose interest brought him into direct connection with the premises. In construing the section regard should be had to its general purpose, which was to suppress as effectually as possible the user of premises for immoral purposes. By sub-s. 3 it makes the lessor or landlord of premises liable where he lets them to be used as a brothel; and by sub-s. 2 it for the first time makes the tenant, lessee or occupier liable for permitting the premises to be used as a brothel or for the purposes of habitual prostitution, the landlord not being made liable for the latter offence, as he has not the direct management of the premises. A statute, and more particularly a penal statute, such as the Act of 1885, ought not usually to be so construed as to extend its operation. The Act of 1912, s. 4, sub-s. 1, provides that s. 13 of the Act of 1885 shall, so far as it relates to brothels, be amended by adding the words "or person in charge" of the premises. A sharp distinction is thus drawn between the user of premises as a brothel and the user of them for habitual prostitution, even a person in charge of the premises being made liable only for the former and not for the latter user. If the respondent were to be held to be lessee of these premises within the meaning of s. 13, sub-s. 2, it would follow that, if he permitted them to be used as a brothel, not only would he be liable under that section, but under s. 5 of the Act of 1912, his landlord would be entitled to require him to assign his lease to some approved person, and if he failed to do so his landlord would then be entitled to determine his lease, and if that were done the Court would have power to order delivery of possession of the premises to the landlord.

Croom-Johnson K.C. replied.

AVORY J. This point which has arisen under the Criminal Law Amendment Act, 1885, s. 13, has never before received consideration, so far as I am aware. Our attention has been called on behalf of the appellant to a passage in the 3rd edition of the text-book on that Act bearing the name of the learned magistrate whose decision is now under appeal, and it has been suggested that that passage shows that s. 13, sub-s. 2, of the Act would include such a case as this. It is, however, only fair to the learned magistrate to observe that in the 4th edition of that work which was published in 1913, at pp. xxxviii. and xxxix., the learned authors had added a note to s. 5 of the amending Act of 1912 which apparently bears out the view which the magistrate has expressed in this case. They there say: "If an 'occupier' of a house, not being a 'lessee,' let a room to a lodger, who used it as a brothel with the connivance of such occupier, such occupier would not be guilty under s. 13 (2.), as he would not be 'tenant' or 'occupier' of the room kept as a brothel, but he might fall within s. 13 (3.), of the Criminal Law Amendment Act, 1885, which deals with landlords who may connive when tenants misuse their premises. With regard to 'lessee,' as we may presume occupation is not necessary in his case to bring him within the section, it would be perhaps easier for him, than for an actual 'tenant' or 'occupier,' to 'permit,' without at the same time committing the offence of aiding and abetting, a breach of the law, but as such a lessee, not in occupation, would be in all probability the landlord of the occupiers, s. 13 (3.) would be also in his case the more appropriate provision." That note is not of course an authority binding on this Court. We have to deal with the opinion expressed by the learned magistrate in this case. The respondent was summoned to answer a charge that he, being lessee of a certain house, unlawfully and knowingly permitted part of it, to wit the first and second floors, to be used for the purposes of habitual prostitution. He was thus summoned as being the lessee of the whole house and not as the lessee of the premises here in question—namely, the first and second floors. The magistrate in expressing his opinion said: "Even if the premises were used for the purposes of habitual prostitution, and the respondent knowingly permitted it, he was not guilty of the offence." He proceeded to say: "Only those who had immediate control of the premises were responsible. 'Lessee' must be construed ejusdem generis with 'tenant' and 'occupier,'" by which statement I understand him to mean that "lessee" must be construed as meaning lessee in occupation. He further said: "I thought that sub-s. 3 of s. 13 alone dealt with permission by a landlord of immorality by his tenant, that being the relation in the present case." In my view the construction which the learned magistrate has put upon sub-s. 2 is correct, and, as the relation of the respondent to the women to whom the two flats in question were sub-let was that of a landlord to a tenant, it follows that the respondent was not the lessee of these flats within the meaning of that sub-section.

In my opinion this appeal should be dismissed.

SWIFT J. I agree.

ACTON J. I agree.

Appeal dismissed.

Solicitors for appellant: *Allen & Son.*

Solicitors for respondent: *Percy Robinson & Co.*

J. R.

BROWN AND ANOTHER v. JOYCE.

1930
Dec. 18.

Licensing—Permitted Hours—Hours for Clubs on Sundays—Fixed Number of Hours between specified limiting Hours—Discretion of Golf Club to alter limiting Hours—Licensing Act, 1921 (11 *&* 12 *Geo.* 5, *c.* 42), *s.* 2, *sub-ss.* 1, 2.

The Licensing Act, 1921, s. 2, provides by sub-s. 1 that "The hours during which intoxicating liquor may be sold or supplied on Sundays . . . . in any . . . . club . . . . shall be as follows, that is to say, five hours, of which not more than two shall be between 12 noon and 3 in the afternoon, and not more than three between 6 and 10 in the evening . . . ."; and by sub-s. 2 that "Subject to the foregoing provisions, the permitted hours on Sundays shall be such as may be fixed . . . . in the case of a club in accordance with the rules of the club. . . . ." In a golf club the permitted hours on Sundays were fixed by a rule of the club at five hours—namely, from 12 noon to 1.30 P.M., 2 P.M. to 2.30 P.M., and 4.30 P.M. to 7.30 P.M.; and pursuant to that rule a supply of intoxicating liquor was given to members of the club on a Sunday at 5 P.M.:—

Held, that on the true construction of the above section the permitted hours on Sundays for a club were a period of not more than two hours, the whole of which should be between 12 and 3 P.M., and a period of not more than three hours, the whole of which should be between 6 and 10 P.M., and consequently that the supply in question was not authorized by the section.

CASE stated by justices for the county of Essex.

An information was preferred before the justices, sitting at Thorpe-le-Soken, by Thomas Augustus Joyce, superintendent of police (hereinafter called "the respondent"), under the Licensing Act, 1921 (1), against John Murray

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(1) Licensing Act, 1921, s. 2: "(1.) The hours during which intoxicating liquor may be sold or supplied on Sundays, Christmas Day and Good Friday in any licensed premises or club, for consumption either on or off the premises, shall be as follows, that is to say, five hours, of which not more than two shall be between twelve (noon) and three in the afternoon, and not more than three between six and ten in the evening. . . . . (2.) Subject to the foregoing provisions, the permitted hours on Sundays shall be such as may be fixed, in the case of licensed premises by order of the licensing justices of the licensing district, and in the case of a club in accordance with the rules of the club. . . . ."

Sect. 4: "Subject to the provisions of this Part of this Act, no person shall, except during the permitted hours—(*a*) either by himself, or by any servant or agent, sell or supply to any person in any licensed premises or club any intoxicating liquor to be consumed either on or off the premises; or (*b*) consume in or take from any such premises or club any intoxicating liquor."

Brown and Edward Charles Brett, secretary and steward respectively of the Frinton Golf Club, Frinton, in the county of Essex (hereinafter called "the appellants"), for that they on August 3, 1930, being Sunday, unlawfully did, except during the hours during which intoxicating liquor may be sold or supplied on Sundays, Christmas Day, and Good Friday in any licensed premises or club for consumption either on or off the premises, supply to certain persons in the Frinton Golf Club aforesaid, being a registered club, certain intoxicating liquor, to wit, ale and beer, contrary to s. 4 (*a*) of the Licensing Act, 1921, aforesaid.

On August 11, 1930, the information was heard by the justices, when the following facts were proved or admitted: The Frinton Golf Club is a members' club duly registered under the Licensing Acts in that behalf. The permitted hours for the supply of intoxicating liquor in the club on Sundays, Christmas Day, and Good Friday were fixed by rule of the committee of the club at five hours, as follows—namely, from 12 noon to 1.30 P.M., 2 P.M. to 2.30 P.M., and 4.30 P.M. to 7.30 P.M. Such rule had been duly registered by the clerk to the justices, and was in force on the date of the supply charged in the information. The supply charged was to members of the club on the club premises. Such supply took place at 5 P.M. on Sunday, August 3, 1930.

On the part of the appellants it was contended that the supply and consumption having taken place at an hour within those fixed as permitted hours by the committee of the club did not constitute an offence within the Licensing Acts.

On the part of the respondent it was contended that the hours purporting to be fixed by the committee as permitted hours were not such as it was competent for the committee to fix by law, inasmuch as the second period for the sale or supply of intoxicating liquor on Sundays, Christmas Day, and Good Friday should be not more than three hours, and be between 6 P.M. and 10 P.M., and that the supply charged being at an earlier hour than 6 P.M.—namely, 5 P.M.—could not in law be authorized by rule of the committee of the club, and therefore constituted an offence under s. 4 (*a*) of the Act.

The justices, being of opinion that the second period of permitted hours on Sundays could not be fixed for a club to commence earlier than 6 P.M., upheld the contention of the respondent, and convicted the appellants of the offence charged, and adjudged each to pay a fine of 1*l.*

The question for the Court was whether upon the above statement of facts the justices came to a correct determination and decision in law.

T. Hynes (*T. Jameson* with him) for the appellants. The justices were wrong in convicting the appellants of the offence with which they were charged. The appellants did not contravene s. 2 of the Licensing Act, 1921, by supplying intoxicating liquor to members of the club at the hour in question. Under the law as it existed before the passing of the Act the members of a club had a right to be supplied with intoxicating liquor on any day of the week at any hour of the day, and an official of the club who supplied it to them was guilty of no offence: *Graff* v. *Evans* (1) and *Newell* v. *Hemingway.* (2) The Act of 1921 has not very materially restricted that common law right of the members of a club. Sect. 2, sub-s. 1, provides that the hours during which intoxicating liquor may be sold or supplied on Sundays in any club shall be five hours, of which not more than two shall be between 12 noon and 3 P.M., and not more than three between 6 and 10 P.M. There being here no reason to the contrary, the sub-section should be construed according to the grammatical and ordinary sense of its words: see per Lord Wensleydale in *Grey* v. *Pearson* (3); and when so construed it clearly means that a club is to have five hours on Sundays for the sale or supply of intoxicating liquor, of which some part, not exceeding two hours, shall be between 12 and 3 P.M., and some part, not exceeding three hours, shall be between 6 and 10 P.M. The sub-section permits the taking

(1) (1882) 8 Q. B. D. 373. (2) (1888) 58 L. J. (M. C.) 46.
(3) (1857) 6 H. L. C. 61, 106.

of the five hours at any time of the day so long as some parts or other thereof are between the specified limits. The five hours may be distributed in any way over the time during which the club is open on Sunday, provided any portion of these hours, not exceeding two hours, is between the earlier limits, and any portion not exceeding three hours between the later limits. The sub-section does not mean that the whole of two of the five hours shall be between 12 and 3 P.M., and the whole of three of the five hours between 6 and 10 P.M.; or that no part of the five hours shall be before 12 noon, or between 3 and 6 P.M., or after 10 P.M. In order to bear that meaning it would have had to provide that "two hours and not more than two" should be between 12 and 3 P.M., and "three hours and not more than three" between 6 and 10 P.M. Golf clubs are not open in the evening, and if three of the five hours allowed to them can only be taken between 6 and 10 P.M., the practical effect will be that for three of the five hours the members of these clubs will be unable to obtain intoxicating liquor, a result which cannot have been intended by the Legislature. The section being a penal enactment ought not to be so construed as to increase its stringency: *Rex* v. *Vasey & Lally* (1) and *London County Council* v. *Aylesbury Dairy Co.* (2); but unless the literal construction of this sub-section be adopted the stringency of the section will be increased. According to the construction of sub-s. 1, for which the appellants contend, they were guilty of no offence in supplying intoxicating liquor at the hour in question. Even if the true construction of sub-s. 1 be that put upon it by the justices it does not follow that the appellants were guilty of any offence. Sub-s. 2 provides that the permitted hours on Sundays shall be such as may be fixed in the case of a club in accordance with the rules of the club, and gives the committee of a club a discretion to divide the five hours in any way that may suit the convenience of the members. In the exercise of the discretion thus given to them the committee of this club made a rule fixing one of the periods of permitted hours from 4.30 to 7.30, and the supply in question made by the appellants took place during that period.

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(1) [1905] 2 K. B. 748, 750.

(2) [1898] 1 Q. B. 106.

F. D. Levy for the respondent. The justices rightly convicted the appellants of the offence with which they are charged. The supply of intoxicating liquor to members of the club at the hour in question was a contravention of the Act of 1921. Sect. 2, sub-s. 1, of the Act no doubt provides that the hours during which intoxicating liquor may be sold or supplied on Sundays in any club shall be five hours, of which not more than two shall be between 12 noon and 3 P.M., and not more than three between 6 and 10 P.M. In construing that sub-section, however, as in construing any statutory provision, regard should be had to the general purpose of the enactment, and the language ought not to be interpreted according to its ordinary and grammatical meaning if that would lead to a manifest contradiction of that purpose, or to some inconvenience or absurdity presumably not intended: *Rex* v. *Vasey & Lally*. (1) The purpose of that sub-section is to provide for all clubs in general, and not for particular clubs having unusual times of opening or closing, certain definite periods within which they may sell or supply intoxicating liquor on Sundays. In view of that purpose the plain meaning of the sub-section is that there shall be for such sale or supply a period of not more than two hours, the whole of which shall be between 12 and 3 P.M., and a period of not more than three hours, the whole of which shall be between 6 and 10 P.M. The strict literal construction put upon the sub-section by the appellants would defeat its purpose and lead to manifest absurdity. According to that construction five minutes only of the two hours might be taken between 12 and 3 P.M., and five minutes only of the three hours between 6 and 10 P.M., and the remainder of the five hours might be taken at any time whatever during the day. The sub-section is merely permissive in its terms, providing that intoxicating liquor "may" be sold or supplied between specified hours, and it is not imperative making it incumbent on clubs to sell or supply within these hours. If golf clubs

(1) [1905] 2 K. B. 748, 750, 751.

close at such a time of the day that the members cannot avail themselves of the three hours as fixed by the sub-section, they are not on that account entitled to take these hours earlier in the day to suit their own convenience. Sub-s. 2 no doubt provides that the permitted hours on Sundays shall be such as may be fixed in the case of a club in accordance with the rules of the club ; but that provision is governed by the opening words of that sub-section, "subject to the foregoing provisions," and it does not authorize the committee of a club to fix any hours except within the limits prescribed by sub-s. 1.

Hynes in reply. Sect. 2, sub-s. 1, is not permissive, but imperative. It provides that the hours during which intoxicating liquor may be sold or supplied on Sundays in any club "shall" be five hours, but according to the construction put upon the sub-section by the respondent, golf clubs will be deprived of the greater part of that time.

AVORY J. This is a case stated by justices of Essex raising for the opinion of this Court a question of law under the Licensing Act, 1921, s. 2. The proceedings under the Act were taken by the present respondent against the present appellants, who are the secretary and the steward of the Frinton Golf Club, charging that they on Sunday, August 3, 1930, unlawfully did, except during the hours during which intoxicating liquor may be sold or supplied on Sundays in any licensed premises or club, supply to persons certain intoxicating liquor contrary to the Act. Sect. 2, sub-s. 1, of the Act provides that the hours during which intoxicating liquor may be sold or supplied on Sundays in any licensed premises or club shall be five hours, of which not more than two shall be between 12 noon and 3 P.M., and not more than three between 6 and 10 P.M. By a rule of the club the five hours were fixed as follows—namely, 12 noon to 1.30 P.M., 2 P.M. to 2.30 P.M., and 4.30 P.M. to 7.30 P.M. ; and the respondents, acting under that rule, supplied intoxicating liquor to members of the club on a Sunday at 5 P.M. The justices took the view that the second statutory period of permitted hours on Sundays for a club could not be fixed to commence earlier than 6 P.M., and they upheld the contention of the respondent, and convicted the appellants; and the question is whether in so doing they came to a correct decision in law.

A strong, one might almost say a fervent, appeal has been made to the Court in the interest of persons who play golf. It has been urged that it is essential to the well being, if not to the health, of these persons when they come in from a round of golf about 4.30 or 5 P.M. on Sundays, that they should be able at once to obtain a supply of intoxicating liquor. I cannot allow myself to be influenced by any such appeal as that in construing an Act of Parliament.

Having regard to the words of s. 2 of the Act, I think it is plain that there are on Sundays in a club two periods in the day during which the sale or supply of intoxicating liquor is permitted, one of these being between 12 noon and 3 P.M., and the other being between 6 and 10 P.M.; and that the sale or supply of intoxicating liquor at any hour not within one or other of these periods is an infringement of the Act.

It has been suggested that the first part of sub-s. 2 of that section leaves a discretion to the licensing justices or to the committee of a club to alter the periods which have been fixed, and that so long as they do not exceed the two hours in the first period and the three hours in the second period, it is open to them to fix the five hours at such times as they choose. The result of that construction would be to allow the licensing justices or the committee of a club to fix the opening hour for the sale or supply of intoxicating liquor at 10 or 11 A.M., and to commence the sale or supply in the afternoon at any time after 3 P.M. The answer to the suggestion that that is the true construction of the section is that by sub-s. 2 the discretion given to the licensing justices or to the committee of a club in regard to the fixing of the permitted hours is governed by the opening words of the sub-section, "subject to the foregoing provisions." These words mean that the first period shall be between 12 and 3 P.M., and the second period between 6 and 10 P.M., and leave no discretion to the justices or the committee of a club to fix the opening of the hours during which intoxicating liquor may be sold or supplied on Sundays for the second period before 6 P.M.

In my opinion the justices put the true construction on the Act, and their decision was right.

SWIFT J. I agree. By s. 2 of the Licensing Act, 1921, the hours during which intoxicating liquor may be sold or supplied on Sundays in any licensed premises or club are limited to five hours, of which not more than two shall be between 12 noon and 3 in the afternoon, and not more then three between 6 and 10 in the evening. Acting on behalf of the members of Frinton Golf Club the committee of the club made a rule, which was registered, that the hours on Sundays should be from 12 noon to 1.30 P.M., from 2 to 2.30 P.M., and from 4.30 to 7.30 P.M.; and under that rule the appellants supplied intoxicating liquor to members of the club at 5 P.M. on a Sunday. As golf ceases with daylight and golf clubs are generally closed in the evening, it must be obvious that, if the members of these clubs are to have five hours during which intoxicating liquor can be sold or supplied, the convenience of the members could not be met by the permission to have three of these hours between 6 and 10 P.M. The committee of this club no doubt fixed the hours prescribed by the rule to which I have referred because they considered that these hours would comply with the hours permitted by the Act as they understood them, and would also be the hours most convenient for the members of the club. It seems to me, however, that it is plain that the Legislature has not given power to the licensing justices or to the committee of a club to divide the hours in the way in which they have been divided by the committee of this club. On its true construction the section appears to mean that there shall be five permitted hours, of which two, but not more than two, shall be between 12 noon and 3 P.M., and three, but not more than three, between 6 and 10 P.M. It may be that the Legislature has overlooked the case of clubs which are not open during the whole of the time between 6 and 10 P.M., or that it was not aware of the existence of these clubs. The Act nevertheless exists, and its provisions must be accepted. It probably affects a large number of persons whom it is difficult to suppose that it was intended to affect in this particular way, but that is a matter which the Court cannot take into account. The section is no doubt a penal enactment, but that is not a ground for failing to give effect to its manifest intention. I agree in the interpretation which has been put upon the section by Avory J., and I see no other possible construction of it. On that view the supply by the appellants of intoxicating liquor at the hour in question was clearly unlawful.

In my opinion the decision of the justices was right.

Charles J. I agree.

Appeal dismissed.

Solicitors for appellants: *Regge & Ackroyd.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for John H. Goold, Chelmsford.*

J. R.

1931
Jan. 12, 13, 23.

WINKWORTH *v.* RAVEN.

Innkeeper—Damage to Guest's Goods—Motor-car in Garage—Injury by unusual Frost—Liability of Innkeeper.

An innkeeper is bound only to supply such accommodation for the goods of his guests as he possesses, and is not responsible for damage to those goods unless he is in default.

The plaintiff, a guest at the defendant's inn, put his motor-car in the inn garage, which garage was open on one side. In consequence of an unusually severe frost water in the engine froze and injured it.

Held, that the defendant was not liable.

APPEAL from Northampton County Court.

The plaintiff, Henry Dixon Winkworth, claimed damages from the defendant, R. O. Raven, proprietor of the Grand Hotel, Northampton, for damage done to his motor-car which he had placed in the defendant's garage. The facts were fully set out in the judgment of the county court judge and repeated by Swift J. in his judgment, as follows :—

"The plaintiff, the owner of a Vauxhall motor-car, went with an acquaintance on February 4, 1929, to the Grand Hotel, Northampton, of which the defendant is proprietor. He drove in in the evening, his luggage was removed by a porter, and he was told to take his car to the garage. He knew this garage, because he had stayed at the hotel with his car in the previous October. He subsequently drove into the garage and put his car up. There was an attendant there, named Arch. He asked the attendant if it was all right to leave his car there and the attendant said yes. He garaged his car there all the time he stayed at the hotel, I do not know how many days, but it is stated about a fortnight, and when he departed he paid all garage fees at the rate of 1*s.* a night. He saw the car almost daily during the fortnight he stayed at the hotel. He knew perfectly well that it was a garage with only three sides and, as shown in the photographs which have been put in, with no doors in front, with only an open grid gateway but with a place to the right at the back where cars could be sheltered to some extent from the wind. He knew all that, but he did not know as a matter of fact whether

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there were any heating apparatus in the garage or not; if he had looked he could have found out, but he did not. The next few days he attended to his business and took his car out, perhaps not every day but from time to time for the purpose of business or to have a run in the evenings. It is suggested by Arch that when the plaintiff took his car in he reversed it and had the bonnet facing the grid side of the garage. I am sure where there is a dispute between the plaintiff and Arch the plaintiff is telling the proper story; so in the matter of the receipt, which I shall mention later, I find that the plaintiff's story is the correct one. On the Sunday night, February 10, he drove the car in with the bonnet right against the wall, as on previous nights. It was a warm night comparatively, but coldish weather. He left it with a rug on. The weather gradually turned colder. We know from the chart that has been put in that from 9 o'clock Sunday to 9 o'clock Monday the maximum temperature dropped from 40 degrees to 28.5 degrees and the minimum from 34 degrees to 26 degrees. Some time during the night there was a very hard frost; the temperature had dropped well below freezing point. But it was not freezing and it was not seriously cold when the plaintiff put in his car on that particular night. The next morning, Monday morning, it was cold, as the chart shows. Obviously the temperature must have been below freezing point at that time. The plaintiff says he was pressed on that morning and after breakfast he rushed off to his business and had no time to go to the garage. When he got back at night time he went to the garage, by which time it was very cold, and he says he asked Arch whether he had got rid of the water. Arch said he had not. Then the plaintiff himself opened two taps, got rid of the water and finally put some warm water through to make quite sure that all the water had been got rid of. He said the warm water went through quite satisfactorily and he was satisfied the water was all out. In this connection it was stated by Arch that in fact when the plaintiff first brought his car to the garage he, Arch, warned the plaintiff that he ought to run out the water, as the garage was a very cold one, and Arch said he advised everybody at that period to do so, as it was an abnormally cold winter. The plaintiff denies that and I think the plaintiff is right. I do not think Arch remembers whether he warned the plaintiff or not. The only part of his story which I think is true is that it was his habit to suggest to the guests that they should empty the water out of their cars; but I accept the plaintiff's story that he did not give this advice specifically to him. The car was apparently all right on the Monday night but the next morning the temperature fell further. There was a very hard frost next morning. The plaintiff tried to get his car to start, found it impossible, and on examination of the water jacket he found that the damage had been done in respect of which there is this present claim."

The county court judge held that the defendant was liable on the ground that having taken in the car for the purpose of garaging it for reward he should have taken all reasonable precautions to protect it from harm, and that he had failed to properly heat the garage. He gave judgment for the plaintiff for the agreed sum of 34*l.* 16*s.* 8*d.*

The defendant appealed.

Joy K.C. and *R. C. Vaughan* for the appellant. The county court judge was wrong in holding that the defendant was liable, although he did not find that there had been any negligence on his part. He must have held, therefore, that the defendant owed an absolute duty to the plaintiff to provide a frost-proof garage. That cannot be supported. His only duty was to receive the car if he had room for it, and if he had had no garage he could not have been forced to provide one. Even assuming a duty to provide a garage, it need only be a reasonably efficient one, not one which was proof against unusual weather. The real question is whether there is a custom that an innkeeper must provide such a weather-proof garage. There was no evidence of such a custom. The defendant's liability, if any, rests on the custom of the realm with regard to innkeepers: per Lord Esher M.R. in *Robins & Co.* v. *Gray.* (1) It does not rest on bailment. His liability is thrust upon him; he cannot stipulate as to conditions and contract himself out of his obligation to receive the car, as he could have done if he had been free to make a contract of bailment. He would be liable to indictment if he refused to take the car in, for the customary law of the innkeeper's liability as to vehicles extends to motor-cars: *Aria* v. *Bridge House Hotel* (*Staines*), *Ld.* (1)

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(1) [1895] 2 Q. B. 501, 503.

[*Cunningham* v. *Philp* (2) was also referred to.]

[SWIFT J. referred to *Thompson* v. *Lacy*. (3)]

That case and other cases show that a place may be an inn although it only provides accommodation for guests and their personal luggage. There is no case, with the possible exception of *Dawson* v. *Chamney* (4), where, there being an obligation to provide accommodation, an action has been brought on the ground that the accommodation was inadequate. That case was disapproved in *Morgan* v. *Ravey* (5), but apparently on a misapprehension of the facts. Unless negligence be shown the defendant was only liable for the safe custody of the car.

Vine for the plaintiff. The county court judge has found as a fact that this place was unsuitable for the purpose for which it was intended, and the plaintiff paid for the use of it for that purpose. The defendant's contention seems to be that the plaintiff should have taken all necessary precautions, leaving the defendant free from responsibility.

This was a contract of bailment, and therefore the defendant was under an obligation to exercise the same degree of care as would be expected in one acquainted with the risks to be apprehended from the defects in the garage, of which he was aware: *Brabant & Co.* v. *King*. (6) Even if the plaintiff was also aware of the defects in this garage, the defendant is still liable. Lord Watson, delivering the judgment of the Judicial Committee, said (7): "It would be very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants, has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee." In saying that innkeepers, as bailees, were insurers, Blackburn J., in delivering the judgment of the Court in *Searle* v. *Laverick*, said (1): "The obligation to take reasonable care of the thing intrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing therein deposited may be reasonably safe in it." That summarizes the contention for the plaintiff. The garage in this case was open to the weather and unsuitable.

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(1) (1927) 137 L. T. 299.

(2) (1896) 12 Times L. R. 352.

(3) (1820) 3 B. & Ald. 283.

(4) (1843) 5 Q. B. 164.

(5) (1861) 6 H. & N. 265.

(6) [1895] A. C. 632, 640.

(7) [1895] A. C. 632, 641.

Joy K.C. in reply. The defendant was bound to provide such accommodation as he had, and his legal liability to do so being thus established, it is unnecessary to go further and say that he accepted a bailment of the car.

Cur. adv. vult.

1931. Jan. 23. The following judgments were read :—

SWIFT J. This is an appeal from the judgment of the judge of the Northampton County Court. The case raises a question of great importance to innkeepers and the owners of motor-cars.

The facts are set out by the learned judge in his judgment. [His Lordship stated the facts as set out above, and continued :] Upon those facts the learned judge came to the conclusion that the innkeeper was liable and gave judgment against him for 34*l.* 16*s.* 8*d.*, and the question of law now arises whether or not the defendant is liable to the plaintiff for the damage sustained to the latter's car. It appears to me that this question can only be determined by ascertaining exactly what was the relation between the plaintiff and the defendant. The duty of the defendant to the plaintiff may be quite different according to the relation between them. The defendant might have occupied the position of warehouseman, garage proprietor, or innkeeper, and his liabilities might vary according to which of the positions he occupied. Here he was an innkeeper and, in my opinion, an innkeeper only. An innkeeper is commonly said to be an insurer of goods of the guest brought to the inn against loss by theft. This is, I think, substantially accurate, because an innkeeper undertakes by the common law that the goods of his guest shall not be stolen by his default and, if loss of the goods occurs, it is to be presumed that the goods have been stolen by failure of the innkeeper to take proper care of them unless he can show (*a*) that the guest retained control in such a way that he relieved the innkeeper from his duty to take care of them or, (*b*) that the loss occurred by negligence of the guest, or by (*c*) the act of God or the King's enemies. But the innkeeper is not an insurer of the person of the guest nor of the latter's goods generally: see per McCardie J. in *Maclenan* v. *Segar* (1); he is only responsible in case of injury to the guest or his goods if negligence on the part of the innkeeper is proved. I can find no case in which an innkeeper has been held liable for injury to goods as opposed to loss of the goods unless default on the part of the innkeeper has been proved. If a guest's goods are damaged while at an inn, he must prove that such damage arose from an act of the innkeeper concerned, or his servants, which was negligent, that is, was done in breach of some duty which the innkeeper owed to the guest. In the marginal note to *Dawson* v. *Chamney* it was said (2): "When chattels have been deposited in a public inn, and there lost or injured, the prima facie presumption is that the loss or damage was occasioned by the negligence of the innkeeper or his servants. But this presumption may be rebutted; and, if the jury find in favour of the innkeeper as to negligence, he is entitled to succeed on a plea of not guilty." That was a case in which the plaintiff had left his horse in the stable provided by the innkeeper for the accommodation of guests' horses, and the horse was kicked while it was in that stable by another horse which was in the stable. The Court held that the direction of the learned judge to the jury was right when, at the close of the plaintiff's case, he expressed the opinion to the jury that there was a presumption of negligence which called on the defendant for his answer, which was given by proof of such attention and skilful management as to convince the jury that the damage could not have been occasioned by the negligence imputed. That proof took away the ground of action according to all the authorities. It does not seem to me that that finding would have taken away the liability of the innkeeper for loss of the goods as opposed to injury of the goods.

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(1) (1874) L. R. 9 Q. B. 122, 126.

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(1) [1917] 2 K. B. 325, 328.

(2) 5 Q. B. 164.

That case was referred to and was criticized in the case of *Morgan* v. *Ravey* (1) in 1861, which was an action brought for the purpose of recovering damages in a case where goods had been lost from an inn. In that case Pollock C.B. said (2) that the objection taken to the direction of the learned judge was "that it assumed the defendants were liable if there was negligence in the plaintiff, and that therefore the defendants would be liable, though not only not negligent, but even diligent. But we think that is the law. It is true the expression in the forms in 'tort' is, that the loss was 'propter defectum' of the innkeeper; but we think the cases show that there is a defect in the innkeeper, wherever there is a loss not arising from the plaintiff's negligence, the act of God or the Queen's enemies." That undoubtedly is the position of the authorities as regards loss of the goods; it has not, so far as I can find, ever been decided that that decision is applicable to damage to the goods. "The only case," continued Pollock C.B., "that points the other way is *Dawson* v. *Chamney*, as reported 5 Q. B. 164. According to the report, however, of that case in 7 Jur. 1037 [sub nom. *Dawson* v. *Cholmeley* (3)], 'there was no evidence of the manner in which the horse received the injury for which the action was brought.'" There is a note added by the learned reporter of *Morgan* v. *Ravey* (1) to the effect that the report in 7 Jurist is

(1) 6 H. & N. 265.

(2) 6 H. & N. 277.

(3) 5 Q. B. 164.

evidently incorrect (1): "The judgment, which was written, commences thus (5 Q. B. 168): 'This was a motion for a new trial on the ground of misdirection, the learned judge having told the jury that the innkeeper was not answerable for injury done to the horse of a guest *placed in his stable* by the *kick of another horse*, unless there was some negligence proved in the innkeeper.'" Therefore the learned judge, in *Dawson* v. *Chamney* (2), directed the jury, as I am now venturing to think the law now is, that as regards loss or damage done to the horse placed in the innkeeper's stable the innkeeper was not liable unless there was some negligence in the innkeeper. Pollock C.B. goes on with his commentary (1): "This may be the explanation of that case; for though damage happening to the horse from what occurred in the stable might be evidence of *defectus* or neglect, still, if it was not shown how the damage arose, it was not even shown that it arose from what occurred in the stable": the real facts in that case being that the horse was kicked by another horse while in the stable, and the only way in which the innkeeper could possibly have excused himself was by proving that it was kicked without any negligence on his part: so that he was not an insurer of the horse against damage although in truth he was against loss by theft.

An innkeeper is not necessarily a warehouseman or garage proprietor nor any kind of bailee for reward. On this point see the case of *Hyde* v. *Trent Navigation Co.* (3) He, of course, may, in addition to being an innkeeper, assume such other position for himself and thereby take upon himself the duties attaching to such position, but in this case he was not such a person. An effort was made on his behalf to suggest that he was acting as warehouseman or garage proprietor and that he had, as such, made special terms, but this contention was abandoned. In the transcript of the note of his judgment, the learned county court judge says: "By his defence, the defendant states, in the first place, that he received the car upon terms which were in writing, contained on the receipt given to the plaintiff at the time the

(1) 6 H. & N. 265, 277 (note (*a*)).

(2) 5 Q. B, 164.

(3) (1793) 5 T. R. 389.

car was garaged—namely, ' All reasonable precautions against fire, theft, burglary and accidental damage are taken by us, but attention is drawn to the fact that we will not accept responsibility for any loss or damage sustained from any of these risks by the motor vehicle stated on this receipt.' " The plaintiff denied that he ever received such a receipt and Mr. Vaughan, for the purpose of this case, accepted that denial and abandoned that particular defence.

This case must, I think, be decided on the basis that the relation between the plaintiff and the defendant was purely and simply that of guest and innkeeper. What duty then does an innkeeper owe to the guest who brings to his inn and garages there his motor-car ? I think it is clear that he insures that the car shall not be stolen, but I think he does not insure that the car shall not be damaged and, if damage is in fact sustained by the car, the guest must prove that such damage was caused by the failure of the innkeeper by himself or his servants to observe some duty which he owed to the guest. It is suggested in this case that he owed a duty to provide a place in which the guest could put his car, so built or so equipped with heating apparatus that the car could not be damaged by frost. This seems to me to be putting the duty much too high. An innkeeper is only bound to supply such accommodation for his guests and his goods as he in fact possesses : see hereon *Fell* v. *Knight* (1) and *Browne* v. *Brandt.* (2) A traveller arriving at a village inn could not complain that he was not lodged in a bedroom heated by radiators or supplied with all the amenities to be found in a first-class hotel in a great city, or that his horse and carriage or his motor-car were not placed in stables, coach-houses, or garages of the quality to be found in the most modern and pretentious establishments ; nor could he complain that the innkeeper did not provide any accommodation or adequate accommodation for his horse or carriage or motor-car. He undertakes that the accommodation which he offers is reasonably fit for the purpose, but he does not warrant that it is the best that can be devised, nor does he promise that such

(1) (1841) 8 M. & W. 269.

(2) [1902] 1 K. B. 696.

accommodation shall protect the guest or his goods from every form of danger. Here the defendant provided a garage which, under ordinary weather conditions, was perfectly suitable for the garaging of a motor-car. It was unsuitable for the garaging of a motor-car with water in the radiator or water jacket during frost. That fact was as well known to the plaintiff as it was to the defendant. The plaintiff had put his car into the garage and had kept it there on this occasion (which was not the first time he had used the garage) for a fortnight before February 11, and on that day it was he who, when a frost occurred, first suggested the water should be let out and he himself did it, although, as found by the county court judge, too late. It has been found by the county court judge that the innkeeper by his servant was guilty of no negligence in not drawing the water off. I think this is obviously right, for the man would not know at which minute the car would again be wanted by the owner and, in the absence of any instructions, he might be unwarrantably interfering if he had drawn the water from a guest's car.

What was the position in fact when, on February 11 or 12, the car was damaged by frost? The plaintiff, as a guest at the inn, had placed his car in the place provided by the defendant for the use of guests bringing cars to his house. That place was perfectly safe and proper for cars with water in the radiators on the vast majority of days in the year, but it became unsuitable if, and only if, water were left in the radiator or water jacket on those few days of the year on which severe frost occurred. If severe frost was to be anticipated, it was the business of the plaintiff to let the water out of his car. He did not do so and the damage resulted. In these circumstances, I cannot see that the innkeeper has failed in any duty he owed his guest. The learned county court judge has apparently treated him as a warehouseman and has held, on the authority of *Brabant & Co.* v. *King* (1), that he owed a duty to the guest to provide a garage which should in all circumstances protect the car from harm. But he was not a warehouseman. He at one time wanted to say he was and then to limit his liability by alleging some special contract, but this was abandoned, and, in my view, his obligations were those of an innkeeper and nothing more. As such, I can find no authority for holding him liable for damage to the guest's goods which arises through the goods not being suitable for the accommodation offered, and a car with water in it was not suitable for the accommodation which the innkeeper held himself out to travellers as supplying.

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(1) [1895] A. C. 632.

For these reasons I think the learned county court judge was wrong in holding that the defendant is liable. This appeal must, I think, be allowed, the judgment entered in the county court set aside and judgment entered for the defendant with costs here and below.

MACNAGHTEN J. I am of the same opinion, and but for the fact that we are differing from the learned county court judge, I should not think it necessary to add anything to what my Lord has already said.

The action is brought in the Northamptonshire County Court to recover damages for negligence whereby the plaintiff's motor-car, which had been entrusted to the defendant for safe custody, had suffered damage. The act of negligence alleged in the particulars of claim was the failure on the part of the defendant to take precautions against the risk of injury by frost. In consequence of this alleged act of negligence the water in the water jacket of the engine of the plaintiff's car froze and the engine was thereby damaged. Damages were agreed at 34*l.* 16*s.* 8*d.*

The defendant is an innkeeper; he is the proprietor of the Grand Hotel, Northampton. The plaintiff is the owner of a Vauxhall motor-car, and on Monday, February 4, 1929, he came as a guest to the hotel in his motor-car. He stayed at the hotel for about a fortnight, and during his stay he kept his car in the garage belonging to the hotel. This garage was, as the plaintiff himself stated, in all respects suitable except in times of frost, when there was an obvious risk that by reason of the fact that one side of the garage was open to the air, the temperature in the garage might so fall that the water in the water jacket car would freeze and thereby damage the engine. From Monday, February 4, to Sunday, February 10, there was, it seems, no frost. On the Sunday the plaintiff took his car out for a drive and brought it back to the garage in the evening. In the case of the plaintiff's car, the risk of injury by frost can be avoided by emptying the water jacket, and this can be easily done by turning the taps at the bottom of the radiator; but it seems that it was raining on the Sunday evening when the plaintiff brought his car back to the garage, and the plaintiff, having no apprehension of frost, did not empty the water jacket. During that Sunday night the temperature fell below freezing point and during the next day the frost increased. The plaintiff did not go back to the garage until the Monday evening and he then emptied the water out of his car; but, as the judge has held, the water had in fact frozen and the damage had, in fact, been done earlier in the day. In those circumstances, the learned judge has held that the defendant is liable on the ground that an innkeeper who provides a garage for the use of his guests is bound by law to provide a garage which protects their cars from the effects of frost, and the question we have to determine is whether this view of the obligations of an innkeeper is correct.

For the reasons expressed by my Lord, I think the law does not impose any such obligation upon an innkeeper. By the custom of the realm an innkeeper is bound to provide such accommodation as may be available at his inn for any traveller who may come there and, subject to the provisions of the Innkeepers Act, 1863 (26 & 27 Vict. c. 41), he is answerable for the loss of the goods of his guest. But the guest is only entitled to such accommodation as the inn affords. If the inn has a garage and the guest, with full knowledge of its supposed defects, chooses to use it, he cannot, in my opinion, be heard to complain that it was not a suitable garage for his car or that the innkeeper ought to have provided a better garage.

It was argued on behalf of the plaintiff that on the Monday morning when the risk of injury to the car by frost was

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imminent, it was the duty of the defendant's caretaker to empty the water jacket, and that the defendant was responsible for this supposed act of negligence on the part of his servant; but the learned judge has held that the caretaker had no such duty, and I think that his decision on this question, if it is to be regarded as a question of law, is plainly right. The plaintiff might indeed have had very good cause to complain if the caretaker had interfered in any way with the mechanism of his car.

I therefore think that the appeal should be allowed.

Appeal allowed.

Solicitors for defendant: *Stanley, Hedderwick & Anderson.*
Solicitors for plaintiff: *Amery-Parkes & Co.*

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THE KING *v.* JONES.

Ex parte McVITTIE.

Contempt of Court—Attachment—Judgment Summons—Service within Precincts of Court of Justice.

A plaintiff obtained judgment in a county court against the defendant for a sum of money and costs, and an appeal to the Divisional Court by the defendant was dismissed with costs. The plaintiff's solicitor made various but futile efforts to obtain the fruits of the judgment. The defendant disobeyed a bankruptcy notice and an order for payment of the judgment debt and costs by instalments. Several judgment summonses were obtained against the defendant, but the defendant evaded service of them. Eventually the plaintiff's solicitor served the defendant with a judgment summons within the precincts of a Court of justice where the defendant was waiting for a case, in which he was plaintiff, to be called on. The defendant applied for a writ of attachment against the plaintiff's solicitor for contempt of Court in so doing:—

Held, that, in the circumstances, no contempt had been committed and the rule must be discharged.

Per MacKinnon J., the rule laid down in *Cole* v. *Hawkins* (1738) Andrews, 275, that the serving of process upon a party attending his cause in Court was a contempt of Court is now obsolete.

RULE NISI calling upon Henry Gilman Jones, solicitor, of 8 Bexley Square, Salford, in the county of Lancashire, to show cause why a writ of attachment should not issue against him for his contempt in serving one Eric McVittie on November 28, 1930, in the corridor at the Assize Court at Manchester with a certain judgment summons issued out of the Salford County Court.

According to the affidavit of Eric McVittie, who was a motor driver, on November 28, 1930, he attended at the Assize Court, Manchester, upon the trial of an action in the High Court in which he was plaintiff and Cedric Valentine Godfree and John Smith were defendants. Whilst he was standing in the precincts of the Court—namely, in a corridor of the Court, awaiting the action being called on for trial, Henry Gilman Jones who, according to McVittie, well knew that he was attending the Court as plaintiff upon the trial of the action, served upon him in the corridor a judgment summons issued out of the Salford County Court. McVittie submitted that Henry Gilman Jones was guilty of contempt of Court in serving the judgment summons upon him in the precincts of the said Court whilst he was attending the Court, as the said Henry Gilman Jones well knew, as plaintiff upon the trial of the said action.

According to the affidavit of Henry Gilman Jones, he acted as solicitor for one Alexander Stewart, in an action he brought in the Salford County Court against Eric McVittie claiming damages in respect of the death of his daughter Elsie Stewart, aged twelve years, from injuries received by the negligent driving of a motor-car by the said Eric McVittie. The case was heard on February 8, 1929, when judgment was given for the said Alexander Stewart for 15*l.* and costs which were taxed and allowed at 14*l.* 18*s.* The defendant appealed from such judgment, and an application was made for security for costs and McVittie was ordered to pay into Court as security the sum of 10*l.*, which he did. The appeal was heard by the Divisional Court on May 8, 1929, and was dismissed with costs, which were taxed and allowed at 36*l.* 11*s.*, towards which Mr. Jones obtained out of Court the 10*l.* paid in as security. Of the 56*l.* 9*s.* judgment debt and costs ordered to be paid by the said Eric McVittie nothing whatever had been paid. Several applications for payment were made by Mr. Jones and his London agents without result, and in June, 1929, a bankruptcy notice was applied for and served on Eric McVittie, who disobeyed the order. Nothing having been paid Mr. Jones, on the instructions of his client, applied for and obtained on August 15, 1929, an order for payment of the debt and costs by instalments of 2*l.* per month. As nothing was paid on this order Mr. Jones on October 18, 1929, issued a judgment summons against the debtor, who resided with his father, for hearing in the Salford County Court on December 3, 1929. This summons was left with the Court for service by their bailiffs, but a few days before the date of hearing the High Bailiff reported to Mr. Jones that his bailiffs had been unable to effect service, as they had been unable to meet the debtor. Mr. Jones therefore reissued the judgment summons for hearing on February 11, 1930, and obtained the summons and copy for service from the Court so that service might be effected if possible by the plaintiff. He also was unable, notwithstanding repeated calls at the debtor's residence, to meet the debtor before the date of hearing, and was always denied information regarding his whereabouts by members of his household.

A fresh judgment summons was issued on March 12, 1930, against the debtor for hearing on April 28, 1930. This was given to the plaintiff to serve, but as he again failed to effect service within a reasonable time it was given to a process server (Mr. Young) to serve, but his efforts to effect service also failed.

On June 5, 1930, another judgment summons was issued for hearing on August 5, 1930, and this was given to another process server (Mr. Arnold) to serve. His efforts to effect service before the date fixed for hearing also failed, and he informed Mr. Jones that he had made numerous attempts to meet the debtor at his place of residence and elsewhere.

On November 25, 1930, Mr. Jones issued another judgment summons against the debtor for hearing on January 21, 1931, and learning that the debtor was likely to be in the precincts of the Assize Court, Manchester, on November 28, 1930, he attended there and managed at last to effect service on the debtor. This service was effected in the corridor of the Court at about 10.15 in the morning, some fifteen minutes before the business of the Court was due to commence.

Mr. Jones stated that he was under the impression that he was justified in the circumstances in so serving the debtor, as he had given an enormous amount of trouble and put his client to considerable expense by evading service of process; that in doing so he was actuated solely by the desire to obtain for his client the fruits of his judgment, and that he had no intention of committing any offence against the dignity of the Court.

In granting the rule nisi on January 15, 1931, Lord Hewart C.J. said that counsel might take the rule at his peril. It had to be observed first that there had been considerable delay, and secondly that there was a serious question whether *Cole* v. *Hawkins* (1) was any longer good law.

B. L. O'Malley in showing cause against the rule stated the facts set out in the affidavit of Mr. Gilman Jones and submitted that there had been no interference with the course of justice.

[He was stopped.]

B. H. Waddy in support of the rule. The judgment summons was served upon Eric McVittie while he was within the precincts of the Assize Court awaiting his action being called on for trial. It was held nearly two hundred years ago in *Cole* v. *Hawkins* (1) that the service of process upon a party attending a Court awaiting his action coming on for trial was a great contempt. That case was a motion for an attachment against an attorney for serving the copy of a bill of Middlesex upon the defendant, in an action of assault and battery at the suit of one Lawes, whilst the Chief Justice was hearing causes at nisi prius in Westminster Hall, and the defendant was upon the steps leading to the Court, attending his cause, which was then just about to be called on. Counsel said he remembered a case where the service of a justice's summons upon a person attending the Court whilst it was sitting was held to be a contempt. It was argued upon the other side that the protection which the law gives to persons in these cases extends to them only eundo and redeundo, and that it does not include the serving of a process, as this is no restraint upon the person. Besides supposing the service to be irregular, yet it is no contempt, especially as it does not hinder, or tend to hinder, the trial from going on, and the defendant's presence was not necessary. But Lee C.J. said that "the protection which the law gives in these cases, as well to the parties to causes as their counsel and attornies, extends to them eundo, redeundo and morando; and if the serving of process upon persons attending Courts were to be allowed, it would produce much terror and great distraction in business." The whole Court (except Page J., who hesitated) were clearly of opinion that the service of a process in the sight of the Court is a great contempt, and punishable by attachment.

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(1) Andrews, 275.

[MacKinnon J. A bill of Middlesex (1) was a writ for the immediate arrest of the party against whom it was issued.]

It was argued in that case that it was not contempt, because there was no restraint upon the person but only the serving of a process. That case followed on other instances of contempt where there had been arrest of the person and went one step further in holding that the mere service of a process in the precincts of a Court upon a party awaiting trial was a contempt of Court. *Cole* v. *Hawkins* (1) was cited in *Poole* v. *Gould.* (2) The point in that case was not whether there was a contempt in serving a writ of summons in a Court of justice on a party attending his own cause, but whether the service was void. It was held in that case that the service was good, but the proposition laid down in *Cole* v. *Hawkins* (1) that the service of a process upon a party attending the Court was a contempt on the part of the server, was not dissented from. That case shows that the permission of the Court must be obtained before a party attending the Court can be served with process within the precincts of that Court. In the interests of justice persons attending a Court of justice on business ought to be protected from being served with process whilst going to the Court, whilst in the Court and whilst returning home from Court. In Taylor on Evidence, 11th ed., p. 907, it is stated that "it will also perhaps be deemed a contempt to serve a writ of summons upon a witness in the immediate or constructive presence of the Court."

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(1) "The usual leading process when the action is first commenced in [the Court of King's Bench] . . . . is a Bill of *Middlesex*, which you are to make out in this form:—'*Middlesex* to wit. It is commanded to the Sheriff, that he take *William Cave* and *Richard Roe*, if they may be found in his bailiwic, and keep them safely, so that he may have their bodies before the lord the King at Westminster, on *Monday* next after the morrow of *All Souls*, to answer Ferdinando Hoare in a plea of trespass; and that he have there then this precept. By bill. Lee.'" Richardson, The Attorney's Practice in the Court of King's Bench, 5th ed., 1769, p. 91; see also 3 Blackstone's Comm. Appx. III. §.

Lord Hewart C.J. This is a rule nisi for attachment for contempt. The alleged contempt consisted in serving one Eric McVittie on November 28, 1930, in the corridor of the Assize Court at Manchester with a judgment summons issued out of the Salford County Court. The affidavit of Mr. Gilman Jones, against whom the rule is sought, shows that frequent efforts had been made to obtain payment of the judgment debt and costs for which judgment had been given against McVittie at the suit of one Alexander Stewart. One judgment summons after another was issued. Mr. Gilman Jones says that on November 25, 1930, "I issued another judgment summons against the debtor for hearing on January 21, 1931, and learning that the debtor was likely to be in the precincts of the Assize Court, Manchester, on November 28, 1930, I attended there and managed at last to effect service on the debtor." The case, out of which the judgment summons arose, had been heard on February 8,

(1) Andrews, 275.

(2) (1856) 25 L. J. (Ex.) 250.

1929, when judgment had been given for Alexander Stewart against Eric McVittie for 15*l.* and costs. The judgment summons served upon the debtor on November 28, 1930, was for hearing on January 21, 1931, nearly two months after the date of service. Unless the universal proposition be true that service of process within the precincts of a Court of any kind in any circumstances amounts to a contempt of Court, it is difficult to see how the particular service in this case can be a contempt of Court. The case that is relied upon in support of the rule is *Cole* v. *Hawkins* (1), which is nearly 200 years old. What was being considered in that case was the serving of the copy of a bill of Middlesex. The report says that "the whole Court (except Page J., who hesitated) were clearly of opinion that the service of a process in the sight of the Court is a great contempt, and punishable by attachment. And they said, that persons have been frequently laid by the heels for making arrests in those cases, where they have refused to discharge the party arrested." The matter there relied upon was that of arrest. There are some observations on this case in *Poole* v. *Gould* (2), but that case is not precisely in point, the point there being not whether there was a contempt in serving a writ of summons in a Court of justice on a party attending his own cause, but whether the service was void. Pollock C.B. said (3): "Even admitting the conduct of the party serving the writ to be improper, it does not follow that the service of the writ is void." In that case the rule was discharged after Martin B. had said (4): "The Courts ought to give assistance to creditors, and not throw unnecessary impediments in the way of their service of process." Speaking for myself I do not say that there may not be circumstances in which the service of process within the precincts of a Court may amount to contempt, but on the particular facts of this case I think it is not possible to say that there was any contempt committed here, and therefore the rule ought to be discharged. Having regard to the fact that when the rule was granted counsel was warned

(1) Andrews, 275.

(2) 25 L. J. (Ex.) 250.

(3) 25 L. J. (Ex.) 251.

(4) Ibid.

that he took the rule at his peril, I think the rule ought to be discharged with costs.

Avory J. I agree.

MacKinnon J. I agree that this rule should be discharged with costs. Personally, I regret that it is the only penalty that we can impose upon the applicant, because in my view a more impudent application has never been made in this Court. Here is a man against whom judgment was obtained in February, 1929, and he paid nothing. In June, 1929, a bankruptcy notice was served upon him and he paid nothing. On August 15, 1929, an order for payment of the judgment debt and costs by instalments of 2*l.* a month was obtained. He disobeyed that order flatly. Thereupon a series of judgment summonses were taken out to call upon him to appear before the Court, and give some answer, if he could, for his contempt of the Court which had made that order. All efforts to serve him with those judgment summonses failed because he was keeping out of the way. Eventually he was served with this judgment summons in the corridor of the Assize Court. For him, in these circumstances, to appear in this Court and say that the service of that judgment summons upon him is a contempt of Court seems to me to be farcical. His application is supported by a case—*Cole* v. *Hawkins* (1), almost 200 years old, which was decided at a time when the rule clearly was based upon freedom of litigants who were to appear in the Court from being arrested. I regard that supposed rule as being nowadays entirely obsolete, and I agree thoroughly with what was said by Martin B. in *Poole* v. *Gould* (2): "The Courts ought to give assistance to creditors, and not throw unnecessary impediments in the way of their service of process." It is possible, as has been pointed out by the Lord Chief Justice, that there might be circumstances in which service of a writ within the precincts of a Court might amount to a contempt of Court. Personally I cannot

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(1) Andrews, 275.

(2) 25 L. J. (Ex.) 251.

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conceive what those circumstances could be, but in this case I am perfectly satisfied that it is impossible to suggest that there are such circumstances.

Rule discharged.

Solicitors for applicant: *Light & Fulton.*
Solicitors showing cause: *Braikenridge & Edwards.*

R. F. S.

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Dec. 3, 4, 5, 19.

ALLGEMEINE VERSICHERUNGS - GESELLSCHAFT HELVETIA *v.* ADMINISTRATOR OF GERMAN PROPERTY.

[1928. A. 2055.]

Assignment—Chose in Action—Proceeds of insured Enemy Property detained under Order of Prize Court—Notice of Abandonment by Assured—Acceptance of Notice by Insurers—Trading with the Enemy Amendment Act, 1914 (5 *Geo.* 5, *c.* 12), *s.* 6, *sub-s.* 1.

Sect. 6, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, provides that: "No person shall by virtue of any assignment of any debt or other chose in action, ... made or to be made in his favour by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against the person liable to pay, discharge or satisfy the debt, chose in action, security or obligation, unless he proves that the assignment, delivery or transfer was made by leave of the Board of Trade or was made before the commencement of the present war, and any person who knowingly pays, discharges or satisfies any debt, or chose in action, to which this sub-section applies, shall be deemed to be guilty of the offence of trading with the enemy. . . . ."

In 1916 a firm in Germany despatched to a firm in Lima (both consignors and consignees being at that date enemies within the meaning of the Trading with the Enemy Acts) a parcel of diamonds by a Dutch steamship sailing from Amsterdam, the diamonds being insured against war and other risks with a Swiss insurance company. The British authorities, acting under the Reprisals Order of March 11, 1915, required the Dutch vessel to put in to Kirkwall, where her cargo was examined, and the diamonds being found they were in due course placed in the custody of the Marshal of the Prize Court, which, in February, 1918, ordered their detention and sale. After that order was made, but before the sale was carried out, the assured gave notice of abandonment of the diamonds and ceded all their rights therein to the insurance company, which accepted the notice and paid the assured as for a total loss. In 1919 the diamonds were sold, and the proceeds were ordered by the Prize Court to be handed to the predecessor in title of the Administrator of German property to be dealt with in accordance with the provisions of the Treaty of Versailles and the Treaty of Peace Order, 1919.

The Swiss insurance company, claiming that as a result of the abandonment to them by the assured the diamonds became their property, now sued the Administrator of German Property to recover the proceeds of the sale:—

Held, that the action was not maintainable, inasmuch as (1.) the notice of abandonment and its acceptance constituted an "assignment" within s. 6, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914; (2.) that the proceeds of sale of the diamonds constituted a "chose in action" within the same sub-section; and (3.) that the Administrator of German Property, as representing the Crown, was entitled to rely on the provisions of that sub-section as precluding the insurance company from recovering.

Fried v. *Administrator of German Property* [1925] Ch. 757 approved.

The Oscar II. [1921] 1 A. C. 467 distinguished.

APPEAL from a decision of Roche J.

The facts, which are fully stated in the judgments, were, shortly, as follows: The plaintiffs, an insurance company whose head office was in Switzerland (hereinafter called "the Helvetia Company"), issued in 1875 a floating policy, No. 60, for the insurance of valuables, including precious stones, in favour of George Ehni, of Stuttgart, in respect of valuables sent through the post. That policy was renewed yearly, and by an addendum made in 1894 it was agreed that the policy should be transferred to George Ehni & Co., of Stuttgart. By a floating policy No. 56708, dated November 26, 1894, the plaintiffs insured on behalf of George Ehni & Co. or their principals all shipments of jewellery, and by an addendum to that policy in 1905 all consignments of set stones which the assured sent by post to places overseas, which till then were insured under policy No. 60, were thereafter to be included under policy No. 56708, but consignments of loose stones were still to continue insured under policy No. 60.

In January, 1916, G. Welsch & Co., of Lima, remitted certain sums to George Ehni & Co. and commissioned them to purchase and forward to Lima certain diamonds. George Ehni & Co. carried out these instructions and posted the diamonds to G. Welsch & Co. at Lima in February, 1916, the packet being shipped in the name of a Dutch neutral on board the Dutch steamship *Osterdijk* sailing from Amsterdam. By declaration dated January 21, 1916, the diamonds insured under policy No. 60, including war risks, were declared to the plaintiffs.

By Art. IV. of the Reprisals Order, dated March 11, 1915, it was provided that " every merchant vessel which sailed from a port other than a German port after March 1, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances deem to be just. Provided that no proceeds of the sale of such goods shall be paid out of Court until the conclusion of peace except on the application of the proper officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order. Provided also that nothing herein shall prevent the release of neutral property of enemy origin on the application of the proper officer of the Crown." Under this article His Majesty's Government on February 17, 1916, required the *Osterdijk* to discharge at Kirkwall the postal packet containing the diamonds in question, and they were placed in the custody of the Marshal of the Prize Court. On February 11, 1918, an order was made by the Prize Court for the detention and sale of the diamonds, and, later, the proceeds were paid into Court and transferred to the custody of the defendant.

In June, 1918, after the order for sale, but before the sale, and before the Treaty of Versailles, Ehni & Co. abandoned the diamonds to the Helvetia Company in these terms : " We herewith declare that we abandon the registered letter . . . . insured for M.7300 for which we claim compensation, and that we are ceding all our rights to the Helvetia . . . ."

That notice was accepted by the plaintiffs on June 21, 1918, and they paid Ehni & Co. as for a total loss.

The plaintiffs claimed that as a result of the abandonment the diamonds became their property, and accordingly they claimed the proceeds of the sale.

By his points of defence, the defendant denied that the diamonds or their proceeds became the property of the plaintiffs. He alleged that the firms of Ehni & Co. and Welsch & Co. were at all relevant times enemies within the meaning of the Trading with the Enemy Acts, and that in the circumstances any transfer of the property in the diamonds was precluded by the operation of s. 6 of the Trading with the Enemy Amendment Act, 1914. (1) He further alleged that the proceeds of sale of the diamonds vested in the defendant under the Treaty of Peace Order, 1919, and the provisions of the Treaty of Versailles incorporated therein. (2)

Roche J. said that the question might properly be said to have been determined by the decision of the Prize Court, but the plea of res judicata was not raised in the present action, and as the Attorney-General disclaimed relying on

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(1) See headnote.

(2) Art. 297 of the Treaty of Versailles (June 28, 1919) provided that the Allied Powers reserved the right to retain and liquidate all property, rights and interests within their territories belonging at the date of the coming into force of the Treaty to German nationals or companies controlled by them.

Art. 1 (XVI.) of the Treaty of Peace Order, 1919 (which was passed to carry out the terms of the Treaty of Versailles), provided that "all property, rights and interests within His Majesty's Dominions . . . . belonging to German nationals at the date when the Treaty comes into force (not being property, rights or interests acquired under any general licence issued by or on behalf of His Majesty) and the net proceeds of their sale, liquidation or other dealings therewith are hereby charged," with payment of claims by British nationals.

Art. 1 (XVII.) (*ccc*) [As amended by the Treaty of Peace (Amendment) (No. 2) Order, 1920]: "Where the property, right or interest subject to the charge, consists of any sum of money due to a German national (not being an enemy debt within the meaning of Art. 296 of the Treaty) it shall be payable to the Custodian, and shall be paid to him on demand, and the Custodian shall have power to enforce the payment thereof, and for that purpose shall have all such rights and powers as if he were the creditor."

Art. XVII. (*d*): "The Board of Trade may by order vest in the Custodian any property, rights and interests subject to the charge, or the right to transfer the same. . . . ."

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that plea or on any ground other than s. 6, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, he would treat the case as if the order of the Prize Court had never been made and as if the plaintiffs and the defendant were rival claimants to the fund in proceedings in the Prize Court. Treating the case in that way, he held that the abandonment by the assured to the plaintiffs was an assignment; that although in some circumstances property or funds in Court might fall within the category of choses in action, in this case it was unnecessary to decide whether property or its proceeds detained under the Reprisals Order constituted choses in action, for he held that the property in question was unaffected by s. 6, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, because in his opinion that Act "does not reach or bind the Crown." As, in his view, s. 6, sub-s. 1, did not apply, the proceeds now in question were not German property at the time of the coming into force of the Treaty of Versailles, and accordingly that the plaintiffs were entitled to succeed. He therefore gave judgment in their favour.

The defendant appealed. The appeal was heard on December 3, 4, 5, 1930.

Sir William Jowitt A.-G. and *J. H. Stamp* for the appellant. Roche J. was wrong in holding that the respondents were entitled to recover. First, the notice of abandonment by the assured and the cession by them of their rights in the subject of the insurance to the respondents was an "assignment" within s. 6, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914.

[SCRUTTON L.J. No one seems to have thought of applying the term "assignment" to an abandonment by the assured to underwriters.]

The term is so applied in the index to Chalmers' Marine Insurance Act. In *Simpson* v. *Thomson* (1) both Lord Cairns and Lord Blackburn seem to regard an abandonment as an assignment, Lord Blackburn saying that when the assured has been paid for a total loss "the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters." In *Fried* v. *Administrator of German Property* (1) the argument for the defendant that the dissolution of partnership which was there in question operated as an assignment of certain choses in action, was accepted by Tomlin J.

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(1) (1877) 3 App. Cas. 279.

Secondly, what was assigned in this case was a chose in action within s. 6, sub-s. 1, of the Act of 1914. As Fry L.J. pointed out in *Colonial Bank* v. *Whinney* (2), "all personal things are either in possession or in action. The law knows no tertium quid between the two." Fry L.J. was the dissenting judge in the Court of Appeal in that case, but his view was upheld in the House of Lords. (3) Rights to a fund in Court are always treated as choses in action, and there is nothing in s. 6, sub-s. 1, to cut down the meaning of the expression "chose in action."

Thirdly, the Crown and its officials are entitled to invoke the provisions of s. 6, sub-s. 1, of the Act of 1914. Roche J. took the view that that Act does not "reach or bind the Crown." There is no warrant for the view that the Crown cannot take advantage of the Act. In Maxwell on The Interpretation of Statutes, 7th ed., p. 117, it is stated that "the Crown is not reached except by express words or by necessary implication in any case where it would be ousted of an existing prerogative or interest. It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible." In this case no prerogative of the Crown is cut down by the Act of 1914, and consequently the doctrine that the Act does not reach the Crown has no application. If it were to be held otherwise the Act, which was intended to attach enemy property, would be useless for this purpose. Sect. 6, sub-s. 1, of the Act clearly hits the transaction under which the underwriters claim. *Fried* v. *Administrator of German Property* (1) is precisely in point. Roche J. relied upon

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(1) [1925] Ch. 757.

(2) (1885) 30 Ch. D. 261, 285.

(3) (1886) 11 App. Cas. 426.

The Oscar II. (1) as supporting his view, but in that case s. 6, sub-s. 1, was not raised, and, moreover, no chose in action was there in question. What was being considered was the actual res.

Dickinson K.C. and *H. U. Willink* for the respondents. First, there has been no assignment within s. 6, sub-s. 1, of the Act of 1914. It will be noted that no order has been made by the Board of Trade under s. 4 of the Trading with the Enemy Amendment Act, 1916, vesting the diamonds or their proceeds in the Custodian, and therefore the property continued in the owners. That being so, the assured had no "rights" which they could assign; they had the property in the goods. The suggestion that when goods belonging to A. are rightfully held by B., all that A. has is a chose in action was negatived in *Franklin* v. *Neate.* (2) What was the effect of the abandonment by the assured? When the abandonment was accepted by the underwriters all that remained of the property together with all benefit and advantage belonging or incident to it was held in *Stewart* v. *Greenock Marine Insurance Co.* (3) to vest in the underwriters. Now, by s. 63 of the Marine Insurance Act, 1906, "where there is a valid abandonment, the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto," the draftsman there reproducing the effect of the language of Lord Blackburn in *Simpson* v. *Thomson.* (4) Here the property in the goods passed to the underwriters. An "assignment" points to a transfer of rights by the will of the party and not to a transfer by an act of law. Here there was no assignment of a chose in action; an abandonment has never been described as an "assignment." A chose in action is something that can be recovered only by action. According to the decision of the Privy Council in *The Oscar II.* (5) an enemy could transfer property in goods to a neutral.

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(1) [1920] P. 363; [1921] 1 A. C. 467.

(2) (1844) 13 M. & W. 481.

(3) (1848) 2 H. L. C. 159, 183.

(4) 3 App. Cas. 279, 292.

(5) [1921] 1 A. C. 467.

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[They also referred to *The Tomsk* and *The Frederik VIII.* (1) and *The Cathay.* (2)]

As to the scope of the Act of 1914, Roche J. never said or intended to say that it cut down the prerogative of the Crown. Finding certain property in the hands of the Crown he looked at s. 6, sub-s. 1, to ascertain whether the language of the sub-section had any application to that property. He pointed out that in the section a person was mentioned as "liable to pay, discharge or satisfy the debt, chose in action, security or obligation" unless certain conditions were satisfied, and again that "any person who knowingly pays, discharges or satisfies any debt, or chose in action, to which this sub-section applies, shall be deemed to be guilty of the offence of trading with the enemy." The "person" is the same person mentioned in each of the parts of the section quoted; and certainly the "person" in the second quotation cannot be the Crown. The section not being in his view severable, Roche J. held that the "person" mentioned earlier could not be the Crown either. Further, on the assumption that the sub-section covers goods, it would follow, if the sub-section reaches the Crown, that the Crown must under s. 3 notify itself as to the goods it holds, failure to do so being an offence. On these grounds Roche J. rightly came to the conclusion that s. 6, sub-s. 1, does not reach the Crown.

J. H. Stamp in reply. The primary object of the Act of 1914 was to attach all German assets in this country and keep them in statu quo until the end of the war. The Acts do not confiscate anything: they merely prevent payment to Germans. Sect. 6, sub-s. 1, is part of that procedure. Here the abandonment by the assured to the underwriters was an assignment within the sub-section, a clear case of transfer by the act of the parties. In *Credland* v. *Potter* (3) Lord Cairns said that "there is no magical meaning in the word 'conveyance'"; so here we say that there is no magical meaning in the word "assignment." That word covers any transfer of rights—including in this case the transfer of a fund

(1) (1922) 10 Ll. L. Rep. 588.
(2) (1923) 16 Ll. L. Rep. 378.
(3) (1874) L. R. 10 Ch. 8.

under the control of the Administrator—and as such it is struck at by the sub-section.

Cur. adv. vult.

Dec. 19. The following judgments were read :—

SCRUTTON L.J. This appeal, said to be a test decision for sixty-five similar cases, raises some difficult questions of law and procedure.

In questions of prize during the early part of the Great War the English Government adhered to the principles of the Declaration of Paris in declining to confiscate enemy goods in neutral ships. "Free ships" meant "free goods." When the German Government departed from the recognized principles of the law of nations by sinking merchant ships indiscriminately in a so-called war zone surrounding the British Islands His Majesty by his advisers retaliated in the Reprisals Order of March 11, 1915. Sect. 4 of this Order dealt with the case of neutral vessels sailing from any port other than a German port, but having on board goods of enemy origin, or enemy ownership. Such vessels were required to discharge such goods in a British port and were to be placed in the custody of the Marshal of the Prize Court, and the goods, if not requisitioned for the use of His Majesty, were to be detained or sold under the direction of the Prize Court. The proceeds of goods so sold were to be paid into Court to be dealt with "in such manner as the Court may in the circumstances deem to be just." Art. V. (2.) provided that the practice and procedure of the Prize Court should be followed. The effect of this Order was considered by the Privy Council in the well known case of *The Zamora*. (1) The result of that judgment, given in April, 1916, in respect of goods seized under the Reprisals Order of March 11, 1915, in April, 1915, seems to be that the Prize Court which administered international law was not bound or entitled by that order to do more than "to preserve the res for delivery to the persons who ultimately establish their title." Damages and costs were given against the Procurator-General as representing the Crown, because the necessity for requisitioning the goods, as distinguished from holding them until further order, was not proved. There was a second Reprisals Order of February 16, 1917, after the seizure in that case, under which vessels proceeding at sea on their way from ports in neutral countries affording access to enemy territory, would, unless they called for examination at a British or allied port, be liable to condemnation, and in any event goods taken from them would, until the contrary was established, be deemed to be enemy goods and subject to condemnation. The validity of this Order as binding the Prize Court judge was established in *The Leonora* (1) and *The Stigstad.* (2)

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(1) [1916] 2 A. C. 77.

By Art. 297 of the Treaty of Versailles between Great Britain and Germany and s. XVI. of the Treaty of Peace Order all property of German nationals within His Majesty's Dominions at the date when the Treaty of Versailles came into force, January 10, 1920, was constituted a fund to satisfy the claims of British subjects against Germany or German subjects.

It has been decided by the Privy Council in *The Oscar II.* (3) (in which case the effect of s. 6 of the Trading with the Enemy Amendment Act, 1914, was not considered) that a German subject whose property has been seized under the Reprisals Order may before the Treaty comes into force transfer the ownership to a neutral, so that when the Treaty comes into force, such property not then being property of a German subject will not form part of the fund to satisfy the claims of British subjects.

This being the general position, in a number of cases questions have arisen as to the position of goods owned by a German at the time of seizure under the Reprisals Order, but then abandoned to neutral underwriters and paid for by them.

In prize cases not coming under the Reprisals Order the Prize Court takes no notice of underwriters. As decided in *The Odessa* (4), the Prize Court only deals with the person

(1) [1919] A. C. 974.
(2) [1919] A. C. 279.
(3) [1921] 1 A. C. 467.
(4) [1915] P. 52.

who has the general property, and disregards claims by mortgagees, pledgees, such as bankers who have made advances on bills of ladings, and persons having liens or other incumbrances. The reason given by the Prize Court is that to take notice of such special rights of property, held by neutrals over enemy goods, would be to destroy the whole benefit of capture of enemy goods. They would be sent to sea protected by neutral mortgages or pledges, whose genuineness it would be difficult to determine. In *The Gothland* (1) Sir Samuel Evans laid down a similar rule as to underwriters; he said (2): "There is no precedent for such a claim as has been put forward on behalf of this insurance company, and I think it would be a sad day for the Prize Court if people who are in the position of underwriters, and under contractual obligations to the legal owners of the property, could come and ask the Court to investigate what the position was in regard to their assured and themselves as underwriters," and, further on (2): "I think it is possible that some steps might have been taken by the insurance company, if they had seen fit before the seizure by the Crown, which would have placed them in the position of legal owners of the property. Nothing of that kind was done. The payment was only made after the seizure, and I am not called upon to determine, when we are merely testing ownership of the property at the time of seizure, what the relations of the parties at that time might be, or what the effect of that contractual relationship might be hereafter in months to come when they settled their affairs." The goods in that case were enemy goods and contraband. In cases under the Reprisals Order, owing probably to the decision in *The Zamora* (3), a different view has been taken. Enemy goods, whose abandonment after seizure has been accepted by a neutral underwriter, have been treated as in neutral ownership. In 1922, in the case of *The Tomsk* and *The Frederik VIII.* (4), the President ordered the surrender of the goods or their proceeds to neutral underwriters who had

(1) [1916] P. 239*n*.
(2) Ibid. 240.
(3) [1916] 2 A. C. 77.
(4) 10 Ll. L. Rep. 588.

accepted abandonment from, and had paid German owners for, a total loss, apparently before the Treaty of Versailles. The same result followed in *The Cathay*. (1) In none of these cases nor in *The Oscar II*. (2) was the point raised that the effects of the abandonment were null and void owing to s. 6 of the Trading with the Enemy Amendment Act, 1914. Neutral goods whose abandonment after seizure has been accepted by a German underwriter were treated as enemy goods.

It is therefore necessary, first, to ascertain the facts of the present test case in order to see who was the owner of the goods in question when the Treaty of Versailles came into force, the German owner or the neutral underwriter, or some officer of the Crown like the Procurator-General; secondly, to consider whether s. 6 of the Trading with the Enemy Amendment Act, 1914, has the effect of preventing the neutral underwriter becoming an owner before and at the coming into force of the Treaty of Versailles. This question in my opinion turns on whether the abandonment in question amounts to (*a*) an assignment, of (*b*) a chose in action. This question has not been considered in any previous case, except in so far as it is affected by the judgment of Tomlin J. in *Fried* v. *Administrator of German Property*. (3) Roche J. has held, first, that there has been an assignment; secondly, that it was unnecessary to decide whether the goods and their proceeds in the hands of the Administrator were a chose in action; but that, thirdly, such assignment, if any, is not null and void, because the Act of 1914 relied on does not reach or bind the Crown, and therefore the Administrator of German Property cannot be heard to allege that because of that Act the neutral underwriter was not an owner at the material time. He also held that the Procurator or Custodian or Administrator, not being persons liable to pay, discharge or satisfy the chose in action, if any, could not be guilty of the offence of trading with the enemy.

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(1) 16 Ll. L. Rep. 378.
(2) [1921] 1 A. C. 467.
(3) [1925] Ch. 757.

I have been unable to follow the learned judge's reasoning. A., the owner of a chose in action, is assumed to have assigned that thing, or the right to it, to B., who proceeds to claim from C., who is possessed of the thing, the thing itself or its proceeds. Sect. 6 of the Act of 1914 says that B. cannot make such a claim if A., the assignor, was an enemy, for the assignment gives B. no such rights and remedies because of the enemy character of A., the assignor. I do not understand why C., if a Crown official, is prevented from saying this, because "the Act does not reach or bind the Crown." C., in putting forward this defence to B.'s claim, is protecting the interests of the Crown. If C. is saying that he is not "liable to pay, discharge, or satisfy" because of the enemy character of the assignor he is relying on the Act as a defence. The Administrator under the Treaty and Peace Orders can only appropriate or ask the Prize Court to appropriate goods owned by an enemy at the date when the Treaty comes into effect, and he is saying that at such date, B., in this case the underwriter, was not at that date the owner of the goods or of a right to them, because his only title came from an enemy. It is not that s. 6 does not bind the Crown; the question is whether in any particular case it is a sufficient protection to the officers of the Crown. This, in my opinion, turns upon whether the transaction alleged to give title to the claimant was an assignment by an enemy of a chose in action. The effect of s. 6 on claims by a neutral deriving title from an enemy owner at the time of seizure, and alleging that when the Treaty came into force that neutral was owner of the goods in question by virtue of a transaction with the enemy, does not appear to have been raised in *The Oscar II.* (1) or any of the cases where a neutral underwriter claimed by reason of abandonment by an enemy.

I am unable to accept this reason given by the judge for his judgment, which does not turn on the facts of this particular case. I proceed to state these facts in order to ascertain whether the underwriter's title did depend on the assignment of a chose in action by an enemy. In 1916 the Dutch steamer

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(1) [1921] 1 A. C. 467.

Osterdijk sailed from a Dutch port to South America carrying in its mail a registered letter containing precious stones. In fact these jewels were sent by a German firm named George Ehni & Co. to a German firm, George Welsch & Co., though they purported to be shipped by a Dutch shipper. The jewels were insured against marine risks by a Swiss company, called hereafter "the Helvetia Co.," under open covers effected long before the war. They were also insured against war risks by the Helvetia Co. under agreement during the war. The *Osterdijk* was stopped by a British cruiser and taken into Kirkwall where, amongst other things, the jewels in question were seized under the Reprisals Order. On February 11, 1918, these jewels were brought before the Prize Court, the nominal Dutch shipper appearing, and the President found, as the fact was, that they were of enemy origin and enemy property, and ordered them to be sold by the Marshal and that the proceeds of sale should remain in the Court till the end of the war or pending further order of the Court. This was the ordinary form of judgment under the Reprisals Order, but it is not clear in view of the decision in *The Zamora* (1) how the Court was authorized to order the sale of goods which were not perishable, nor needed for use in the war, nor contraband, though it might order the detention or the sale of perishable goods. The jewels were in fact sold on September 17, 1919, and the proceeds paid to the Admiralty Marshal. Meanwhile in June, 1918, after the order for sale but before the sale, and before the Treaty of Versailles, the German shippers Ehni & Co. abandoned the jewels to the Helvetia Co., who paid the claim on June 21, 1918. Ehni & Co. signed and gave the Helvetia Co. a document stating that they ceded to the Helvetia Co. all their rights against third parties, and the Helvetia Co. kept this document, the claim having been paid "against the transfer of rights attached to this claim." If this transaction passed the property or the right to claim it, having regard to the nature and effects of abandonment, and the provisions of the Trading with the Enemy Amendment Act, 1914, then the Helvetia Co. were owners of the diamonds or the right to claim them or their proceeds when the Treaty of Versailles came into force in February, 1920, and being neutrals were entitled to claim the diamonds, or their proceeds, in the Prize Court. They however made no claim at the time, or indeed till July, 1927. On April 24, 1925, these jewels or their proceeds were again brought before the Prize Court, notice having been given to the solicitor representing the Dutch claimant who had appeared at the previous hearing. He did not appear. The Prize Court had never heard of the Helvetia Co. as interested, and the Helvetia Co. was not summoned and did not appear; Ehni & Co., having been paid by the Helvetia Co., were not interested. Under these circumstances the President ordered the net proceeds of sale of the jewels to be handed to the Custodian (a mistake for the Administrator) of German Property, to be dealt with in accordance with the provisions of the Treaty of Versailles. This would mean that if the jewels or their proceeds were at the end of the war the property of Germans, the Administrator would place the proceeds in the fund to satisfy English claims on Germans; if the jewels were at that time the property of neutrals, the Administrator would pay the net proceeds to those neutrals. Under this Order on December 3, 1925, the proceeds of sale of these jewels were handed by the Marshal to the Administrator. On April 24, 1926, the Administrator writing to Ehni & Co. about claims by another vessel, asked that if Ehni & Co. were interested in goods in any other vessel, particulars should be forwarded to him. On April 29 Ehni & Co. replied that claims for any other goods would be received direct from the insurance company. No such claims were received, and in July, 1927, the Administrator called Ehni & Co.'s attention to this and to the parcel of jewels ex *Osterdijk*. This produced on July 21, 1927, the first claim by the Helvetia Co. accompanied on July 29 by a disclaimer of claim by Ehni & Co. On August 31 the Administrator, relying on the Trading with the Enemy Amendment Act, 1914, declined to pay the claim. This is the question being considered in the present proceedings which are by writ against the Administrator in accordance with the decision in *The Zamora* (1), which explains why a Crown official is sued instead of, as under the old procedure, the captors. I have had some doubt whether the proceedings in the Prize Court being proceedings in rem do not prevent any one from now claiming the goods against the Administrator, but as the Attorney-General did not desire to raise this point, but asked for a decision on the effect of the Trading with the Enemy Amendment Act, 1914, s. 6, I do not think we are guilty of any disrespect to the Prize Court in considering the point which it is hoped this case will decide.

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(1) [1916] 2 A. C. 77.

What is the effect of abandonment under English or German law, which are assumed to be the same? When the total loss of a thing insured is not actual but constructive, that is, where the thing insured is in specie, but the cost of preserving and repairing it would be more than its value when preserved or repaired (see Marine Insurance Act, 1906, s. 60), the assured must give a notice of abandonment. This in itself does not pass any property or rights in the thing insured to the underwriter. If the underwriter then pays the assured a total loss, it used to be thought that the payment passed the property and rights incidental to it to the underwriter, as benefit of salvage. Lord Blackburn in 1877, before the Marine Insurance Act, in *Simpson* v. *Thomson* (2) said (3): "I do not doubt at all that where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid." He distinguishes the case from subrogation to a right to recover damages against a third party in respect of the thing insured, which he says follows on payment for a total loss, but must be exercised in the name of the assured and in respect of his right. For instance, in *Simpson* v. *Thomson* (2), where ships *A.* and *B.*, owned by the same owner, were in collision, and the owner of *A.* being in fault limited his liability in respect of ship *A.*, the underwriter on ship *B.* took nothing by subrogation, for he only took the right of the owner of ship *B.*, and that owner could not sue himself as owner of ship *A.* But before the Marine Insurance Act was passed in 1906, circumstances arose which rendered it necessary to consider whether an underwriter, merely by paying, necessarily became the "owner" of the thing insured. For it might be a damnosa hereditas, whose ownership only imposed liabilities which the underwriter did not want. The owner of a ship wrecked in a harbour might be liable to the harbour authority for the costs of buoying and removing the wreck. The case of *River Wear Commissioners* v. *Adamson* (1), as explained in *The Mostyn* (2), shows the difficulties of deciding the liability of "the owner" in such a case, and in 1894, in *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (3), the question was raised whether underwriters who had paid a total loss were not "owners" liable for the expense of raising the wreck, and Lord Herschell declined to decide the question. Probably in consequence of this question having arisen when the Marine Insurance Act, 1906, was passed, s. 63 was worded thus: "Where there is a valid abandonment, the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto," thus apparently leaving it open to the underwriter not to "take over" the interest of the assured, though "entitled to take it over."

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(1) [1916] 2 A. C. 77.

(2) 3 App. Cas. 279.

(3) Ibid. 292.

In the present case, however, I think that payment by the Helvetia Co. against a cession of the insured's interest, the document of cession being kept by the Helvetia Co. and not repudiated, was an acceptance of abandonment which passed "whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto." The Helvetia Co. also obtained by subrogation any rights incidental to the property which were not proprietary but which were claims for damages against third parties and might diminish the

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(1) (1877) 2 App. Cas. 743.

(2) *G. W. Ry. Co.* v. *Owners of ss. Mostyn* [1928] A. C. 57.

(3) [1894] A. C. 508.

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ALLGEMEINE VERSICHERUNGS GESELLSCHAFT HELVETIA *v.* ADMINISTRATOR OF GERMAN PROPERTY.

Scrutton L.J.

loss. But these rights by subrogation can only be claimed in the name of the assured, and the assured was a German subject who could not claim German property, because of the Treaty. What had the assured to abandon on June 21, 1918, when the abandonment was accepted? The goods were lawfully detained in the hands of the Marshal of the Prize Court to be dealt with as to the Court seemed just. Suppose that the Treaty of Versailles had provided that all goods of German ownership at the time of seizure should be put into the fund to satisfy the claims of English subjects against Germans? What right of any value, indeed what right, would the German owner have had in June, 1918? His goods had been rightly detained, and it depended on the terms of the Treaty what the Prize Court would think right to order as to their further treatment. How in June, 1918, could the German owner or his abandonee, the underwriter, establish any claim to the goods? Before the terms of the Treaty were known the Prize Court had ordered the goods to be sold under the express power given by the Reprisals Order, and it might be difficult, in view of the decision in *The Zamora* (1), to imply any condition that the sale should only be of goods which were perishable or wanted for the prosecution of the war. If such an implication were possible, and the sale was unjustifiable, there would be a claim for damages against the Procurator or Marshal, but no claim to the goods or their proceeds, and that claim, having to be made in the name of a German citizen, would be unenforceable. In April, 1925, the Prize Court, having received no claim to the goods or their proceeds, ordered the proceeds to be handed to the Administrator of German Property to be dealt with in accordance with the Treaty of Versailles—namely, in a fund to satisfy all the claims of English subjects on German subjects. This order, if the point were raised before us, would prevent the Helvetia Co. claiming either in its own name or the name of the assured. The Administrator has received the fund—the proceeds—under an order of the appropriate Court, to be dealt with in a certain way. No claimant could claim as of right to have the proceeds dealt with in another and inconsistent way. The Attorney-General has asked us not to take this point, as he wants the effect of s. 6 of the Act of 1914 decided. Rather reluctantly I propose to decide this.

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(1) [1916] 2 A. C. 77.

In my opinion the transaction of abandonment involved the assignment of a chose in action by an enemy. On the question whether abandonment is or involves an assignment, it is true that there is no express assignment by the assured, unless the cession is an assignment, but only the effect in law of abandonment by a party. But I think the decision of Tomlin J. in *Fried's* case (1) that an assignment or transfer by operation of law—in that case the transfer of a right to debts by reason of a dissolution of partnership—has the same effect as a voluntary assignment by act of the party (a decision with which I agree) applies to a transfer of property by acceptance of abandonment. I am also of opinion, for the reasons I have stated, that this assignment was of a chose in action. As against the Administrator who has received, not the property but its proceeds, the most that can be said is that the Administrator is guilty of breach of duty in not paying over the proceeds of the sale of these jewels to a person who alleges that he had a right to the jewels, at the time when the Prize Court decided to whom the jewels or their proceeds should be paid. It is a claim possibly for damages for selling, possibly for damages for putting the proceeds of sale into the fund under the Treaty, on which fund the Helvetia Co. has no claim. It cannot be a claim for the jewels, for the Administrator never had them in his possession. Under these circumstances I am of opinion that the claim depends upon an assignment of a chose in action, and as the assignor is an enemy, the assignee by accepting abandonment does not obtain any title, and is prevented from asserting any claim against the Administrator by the provisions of s. 6 of the Act of 1914. Roche J. agrees that there is an assignment of a chose in action by an enemy, but takes the view that the Crown cannot raise the defence that this is invalid, because the Act does not reach or bind the Crown. For the reasons already given I think this view is erroneous and that therefore the appeal must be allowed, the judgment of Roche J. set aside, and judgment entered for the defendant with costs here and below.

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(1) [1925] Ch. 757.

I should add that in my opinion we are not bound by the decision in *The Oscar II.* (1), firstly, because the point under the Act of 1914 was not raised; secondly, because in that case the German property sold was actually in possession of the German owner abroad when sold. In this case it was not in his possession at the time of the abandonment. Nor are we bound by the decisions in favour of neutral underwriters, because the effect of s. 6 of the Act of 1914 as a defence was never raised. I should further add, though I do not decide it, that an objection to the title of the Helvetia Co. to sue might arise under the well known decision of *Burnand* v. *Rodocanachi*. (2)

Greer L.J. This is an appeal by the Administrator of German Property from the judgment of Roche J. on the trial of an action by the Allgemeine V. Gesellschaft Helvetia (hereinafter referred to as "the Helvetia Co.") against the Administrator whereby it was declared that the Helvetia Co. are entitled to the sum of 1135*l.* 17*s.* 11*d.*, being the proceeds of a sale of precious stones shipped by George Ehni & Co., Stuttgart, Germany, on the steamship *Osterdijk*, in or about the month of February, 1916, consigned to G. Welsch & Co., of Lima, Peru, and were their (the Helvetia Co.'s) property before January 10, 1920.

It was contended for the Administrator that by reason of the provision of s. 6 of the Trading with the Enemy Amendment Act, 1914, the proceeds of sale of the precious stones never became the property of the Helvetia Co., that the said sum of money in the hands of the Administrator was subject to the charge imposed by Art. 1 (XVI.) of the Treaty of Peace Order made pursuant to the Treaty of Peace Act, 1919. The question in this appeal is whether this contention is right. If it is well founded in law judgment should have been given for the Administrator.

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(1) [1921] 1 A. C. 467.

(2) (1882) 7 App. Cas. 333.

Art. 1 (XVI.) of the Treaty of Peace Order, 1919, which gives statutory force to certain provisions in the Treaty of Versailles, so far as material, is in the following words: "All property, rights and interests within His Majesty's Dominions belonging to German nationals at the date when the Treaty comes into force . . . . and the net proceeds of their sale, liquidation or other dealings therewith are charged" with the payment of debts and claims by British nationals against German nationals. Stated in the words of the Order the question in this appeal is whether the sum of 1135*l*. 17*s*. 11*d*. was on January 10, 1920, the date when the Peace Treaty came into force, either the property of a German national, or the proceeds of sale of the property of a German national.

In order to decide this question it is necessary in the first place to state the facts of the case in their relation to the Trading with the Enemy Amendment Act, 1914, and the Reprisals Order of March 11, 1915. The preamble to the 1914 Act recites that it is expedient to make further provision for preventing the payment of money to persons resident or carrying on business in any country with which His Majesty is for the time being at war. Sect. 1 of the Act provided for the appointment of a Custodian of enemy property for the purpose of receiving, holding, and dealing with such property as might be paid to or vested in him in pursuance of the Act. Sect. 2 provided that money payable to enemy persons by way of dividends, interest, or share of profits should be paid to the Custodian. Sect. 5, sub-s. 1, provided that, with certain exceptions which are not material for the purpose of this judgment, the Custodian should hold any money paid to and any property vested in him under the Act until the termination of the war, and should thereafter deal with the same in such manner as His Majesty should by Order in Council direct. Sect. 6, sub-s. 1, so far as material, reads as follows: "No person shall by virtue of any assignment of any debt or other chose in action, or delivery of any coupon or other security transferable by delivery, or transfer of any other obligation, made or to be made in his favour by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against the person liable to pay, discharge or satisfy the debt, chose in action, security or obligation, unless he proves that the assignment, delivery, or transfer was made by leave of the Board of Trade or was made before the commencement of the present war, and any person who knowingly pays, discharges or satisfies any debt, or chose in action, to which this sub-section applies, shall be deemed to be guilty of the offence of trading with the enemy within the meaning of the principal Act." Sect. 6, sub-s. 2, and s. 8, contain express provisions restricting the transfer of bills of exchange and securities. These provisions were inserted, I think, e majori cautela, to make it impossible for the assignee of a bill of exchange or other security to contend that he was not an assignee of a chose in action. It was unnecessary to make special provision for shares, as was done by s. 8, because it had been expressly decided by the House of Lords in *Colonial Bank* v. *Whinney* (1) that shares are choses in action.

In interpreting the words of emergency legislation it would be a mistake to treat special provisions as to part of a class, as limiting the meaning to be put on the effect of a general provision as to the class. It is not unlikely that in hurried emergency legislation there will be found tautologous provisions.

On March 11, 1915, His Majesty by virtue of his prerogative rights made and issued an Order in Council authorizing certain acts of retaliation for restricting further the commerce of the enemy. It has not been suggested that this Reprisals Order was not justified by the rules of international law administered in Prize Courts. Indeed, it would have required considerable courage to so argue after the decision in *The Stigstad* (2) and *The Leonora* (3), where the much more drastic Reprisals Order of 1917 was held to be justified by

(1) 11 App. Cas. 426.

(2) [1919] A. C. 279.

(3) [1919] A. C. 974.

law and binding on the Prize Court. Art. IV. of the 1915 Order is in the words following: "Every merchant vessel which sailed from a port other than a German port after March 1, 1915, having on board goods which are of enemy origin or are enemy property may be required to discharge such goods in a British or allied port. Goods so discharged in a British port shall be placed in the custody of the Marshal of the Prize Court, and, if not requisitioned for the use of His Majesty, shall be detained or sold under the direction of the Prize Court. The proceeds of goods so sold shall be paid into Court and dealt with in such manner as the Court may in the circumstances deem to be just. Provided that no proceeds of the sale of such goods shall be paid out of Court until the conclusion of peace except on the application of the proper Officer of the Crown, unless it be shown that the goods had become neutral property before the issue of this Order. Provided also that nothing herein shall prevent the release of neutral property of enemy origin on the application of the proper Officer of the Crown." I assume that the limited interference with the rights of neutrals to purchase and obtain possession of neutral property or its proceeds during the war was not unlawful "as entailing on neutrals a degree of inconvenience unreasonable in all the circumstances of the case," and it is therefore not necessary to put any limited construction on the Order as was done by the Privy Council with regard to another Order in Council in *The Zamora*. (1)

On February 15, 1916, a parcel of diamonds, which was insured against war risks by the Helvetia Co., which was and is a Swiss company, was shipped at Amsterdam on board the *Osterdijk* for carriage to a port in South America. It was German property being shipped in the name of a Dutch shipper by a German domiciled in Stuttgart to a German in South America. It was not disputed that it was liable to be dealt with under the Reprisals Order.

On February 17 the ship was taken by one of His Majesty's ships into Kirkwall, the cargo was discharged, and in due course the diamonds were placed in the custody of the Marshal of the Prize Court. Thereafter a claim was made for the release of the diamonds by the nominal shipper which was heard and determined by the President, Sir Samuel Evans, on February 11, 1918. By his judgment it was declared that the diamonds were enemy property and of enemy origin, and the goods were ordered to be sold and it was ordered that the proceeds of sale should remain in Court to the end of the war or pending further order of the Court.

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(1) [1916] 2 A. C. 77.

I do not feel at all confident that the order of the Court for sale was right. The diamonds were not perishable goods. It is pointed out in the judgment of the Privy Council delivered by Lord Parker in *The Zamora* (1) that the primary duty of the Prize Court is to preserve the res for delivery to the persons ultimately entitled, and the Court expressed the opinion that the Court had no power to order a sale of property seized before it was decided that it was rightly seized and liable to condemnation. Be this as it may, the only Court in which a neutral can make complaint as to wrongs done to him by a belligerent is the Prize Court. This is stated in apt words by Lord Parker in *The Zamora* (2): "The acts of a belligerent Power in right of war are not justiciable in its own Courts unless such Power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the Courts of any other Power. As is said by Story J. in the case of *The Invincible* (3) 'the acts done under the authority of one Sovereign can never be subject to the revision of the tribunals of another Sovereign; and the parties to such acts are not responsible therefor in their private capacities.' It follows that but for the existence of Courts of Prize no one aggrieved by the acts of a belligerent Power in times of war could obtain redress otherwise than through diplomatic channels." If that part of the Order in Council which purports to give the Prize Court power to order goods seized under the Order to be sold is invalid, the only Court where that contention can be raised is the Prize Court. If the Court has wrongly

(1) [1916] 2 A. C. 77.

(2) Ibid. 92.

(3) (1814) 2 Gall. 28, 44.

exercised its power, the remedy is by way of appeal to the Privy Council, or it may be by application to the Prize Court to rescind its own order as made per incuriam. Any other Court must, in my judgment, treat the Order as binding.

On June 21, 1918, notice of abandonment was given by the German owner to his insurers the Helvetia Co. On June 21 the Helvetia Co. paid for a total loss, the German owners ceded all their rights to the Helvetia Co., and the latter company accepted the abandonment and the cession of rights, and thereby took over the interest of the assured in whatever remained of the subject-matter insured and all proprietary rights incidental thereto: see s. 63 of the Marine Insurance Act, 1906.

Unless this transfer of rights to the Helvetia Co. is precluded from operating in favour of the neutral insurers by reason of s. 6 of the Trading with the Enemy Amendment Act, 1914, the insurers would undoubtedly have been entitled at the end of the war to have succeeded in an application to the Prize Court for an order that the proceeds of sale should be paid out to them: see *The Oscar II.* (1) If, however, the transaction is within s. 6 of the Act of 1914, the transfer of rights which might otherwise have taken place is ineffective.

On September 17, 1919, the order of the Prize Court directing the sale of the diamonds was carried out, and the proceeds of sale were held by the Marshal pending the end of the war or further order of the Court.

On June 28, 1919, the Order in Council made under the Treaty of Peace Act, 1919, was issued, to come into force as already stated, on the date when the Treaty of Peace came into force. On January 10, 1920, the Treaty of Peace came into force. On April 24, 1925, the President of the Prize Court on the application of counsel for the Crown, after notice to the original claimants, ordered the net proceeds of the sale of the diamonds to be handed to the Custodian of Enemy Property, to be dealt with in accordance with the provisions of the Treaty of Versailles. At this date the Administrator had taken the place of the Public Trustee as

(1) [1921] 1 A. C. 467.

Custodian of Enemy Property. This order necessarily involved a decision by the Prize Court that at the date of the order the proceeds of sale of the diamonds detained in the hands of the Marshal were included in the words of Art. 1, sub-s. XVI. of the Treaty of Peace Order, 1919, already referred to, as being property, rights and interests belonging to a German national at the date of the coming into force of the Peace Treaty. As no other Court had any jurisdiction to give effect to any claim by a neutral to property taken by the Crown as an act of war, it is difficult to see that the neutral can have any remedy except by way of appeal from the order of the Prize Court. This would be a fatal objection if relied upon by the Administrator. The Attorney-General, on behalf of the Crown, waived his right to rely on the order of the Prize Court as a final adjudication of the matter in dispute. I doubt if this waiver can give the Court jurisdiction to decide a matter that is only justiciable in the Prize Court, that is to say, the liability of an Officer of the Crown to hand over to a neutral the proceeds of sale of property seized by the Crown as a belligerent. Be this as it may, I am prepared to consider and decide the other questions arising in the appeal, as, assuming the jurisdiction which seems to me doubtful, there are in my judgment other reasons why the respondent's claim ought not to have succeeded.

Three questions arise for consideration: first, are the rights to which the Helvetia Co. succeeded by reason of their acceptance of the abandonment within the words " chose in action " or " any other obligation " as they are used in s. 6, sub-s. 1, of the Act of 1914? Secondly, if so, did the notice of abandonment followed by acceptance amount to an assignment of a chose in action, or transfer of an obligation within the meaning of that section? Thirdly, does the section apply at all to a case where the debt, chose in action, or obligation, is one in respect of which the person liable to pay, discharge, or satisfy the debt, chose in action, security or obligation, is the Crown or some servant of the Crown?

With regard to the first question: No transfer of anything, whether property or rights, took place until after the first order of the Prize Court. After that order no one could get possession of the diamonds until the end of the war or pending further order of the Court. So long as the property was detained in the Prize Court in invitum against the owner, his rights could only be described accurately as rights in action. He was clearly not in possession either actually or in contemplation of law. He could only obtain possession by legal proceedings. The rights of the German owner were clearly choses in action within the definition of that kind of property given by Fry L.J. in *Colonial Bank* v. *Whinney* (1), approved by the House of Lords. (2) I am inclined to think that the definition may be a little too wide, as it would seem to apply to the rights of an owner of goods which have been warehoused, or which are subject to some other form of bailment. Choses in action were not capable of assignment at common law, but this rule was never held to apply to the sale by an owner of goods in the possession of a warehouseman or other bailee. Such an owner could always bring trover for a wrongful conversion of the goods in his own name: see, for example, *Franklin* v. *Neate.* (3) In that case the pawnee's right to retain the goods had ceased on tender by the owner of the amount owing, and the right to possession had reverted to the owner of the goods.

Whatever may be said as to the rights of the owner of goods which have been temporarily placed in possession of a third person, it seems to me that goods which are rightfully detained by the Marshal of the Prize Court, or of which the owner cannot obtain possession except by an application to the Prize Court in which he would have to litigate the question between himself and the proper Officer of the Crown, are goods in respect of which his rights are choses in action.

At the date of the acceptance of the abandonment the goods were in esse. They had not then been sold. The only Court that had any jurisdiction to deal with any claim to the goods had ordered their sale. The only rights which the German owner had, were: first, the right to appeal against the order for sale, or, secondly, the right, if he decided not to complain of the order for sale, to apply to the Prize Court after the end of the war for an order that the Marshal should be directed to pay over the proceeds of sale to him.

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(1) 30 Ch. D. 261, 285.

(2) 11 App. Cas. 426, 438, 446.

(3) 13 M. & W. 481.

By the acceptance of abandonment these rights passed to the insurers. In my judgment, whether the definition of Fry L. J. in *Colonial Bank* v. *Whinney* (1) be or be not too wide, the rights we have to deal with in the present case are choses in action or obligations within s. 6, sub-s. 1, of the Act of 1914.

It was argued that the decision in *The Oscar II.* (2) binds this Court to hold that in the present case the proceeds of sale can be recovered from the Administrator as enemy property. That was an appeal from a decision of the Prize Court. In that case the property had passed to the neutral before any order of detention was made by the Prize Court. It seems to have been conceded by those who argued the case for the Crown that the neutral purchaser obtained a complete title to the goods before any order was made in the Prize Court. It was not contended that the purchaser only obtained by his purchase the assignment of a chose in action or the benefit of an obligation. It may be that where the assignment or transfer takes place before any order is made by the Prize Court, a purchaser becomes the absolute owner of the goods, and is not a mere assignee of a chose in action or the transferee of an obligation. The decision in that case does not seem to me to apply to the facts of the case we have to consider in this appeal, because, first, here the transfer took place after the first order of the Prize Court; and, secondly, this Court cannot act as a Court of Appeal from the decisions of the Prize Court.

With regard to the second question: in my judgment the transaction between the German owner and the insurers which began with the notice of abandonment and ended with the payment of the policy moneys and the acceptance of the abandonment, was an assignment or transfer of the chose in action or obligation. The object of s. 6, sub-s. 1, was to leave debts and choses in action to which German nationals were entitled in statu quo until the end of the war so that they might be dealt with in such manner as might be arranged by a Treaty of Peace. It was designed to prevent choses in action from becoming the property of British nationals or neutrals. It was equally desirable to restrain the transfer of choses in action to neutrals whatever form the transfer took, as it was to restrain transfer by express assignment. The words of the section are, in my opinion, wide enough to cover a transfer of rights which operates by reason of the acceptance by an insurance company of a notice of abandonment.

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(1) 30 Ch. D. 261, 285.

(2) [1921] 1 A. C. 467.

On questions (1.) and (2.) I agree with the judgment of Roche J.

The third question is concerned with a difficult problem. As I understand the judgment of Roche J. he decided that s. 6 only applied when the person liable to pay, discharge, or satisfy the chose in action or obligation is a subject, and has no reference to the position that arises where the person liable to pay is the Crown or a servant of the Crown. I have come to the conclusion, though not without hesitation, that s. 6 applies where the person liable to pay or satisfy the chose in action is the Crown or a servant of the Crown. When the abandonment was accepted and the transfer took place the goods were in the hands of the Marshal of the Prize Court, and in Prize Court proceedings one of the parties to the litigation is always the Crown, who under existing law, takes the place of the captor in the law as it was before the Naval Prize Act, 1864. Lord Parker says in *The Zamora* (1): "It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which has been duly fiated. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant." It seems to me to follow that, as the King is the person against

(1) [1916] 2 A. C. 77, 91.

whom the right to a chose in action could be claimed in the Prize Court, the words of s. 6 are wide enough to cover the assignment of a chose in action which a German national would, apart from the section, be entitled to say that the Crown was liable to pay or discharge, or to cover an obligation which he was entitled to say that the King as a party to the litigation in the Prize Court was liable to meet. Of course, it is beyond controversy that the Crown is not affected by the words of the section which make it criminal for any person knowingly to pay or discharge any debt or chose in action to which the sub-section applies. But the words can be completely satisfied by applying them to any servant of the Crown who, without any binding order of the Court, hands over to an assignee moneys which in his hands were the property of an enemy national.

For these reasons I have come to the conclusion that the judgment of Roche J. should be reversed and judgment entered for the Administrator, with costs here and below.

SLESSER L.J. In this appeal an Official of the Crown known as the Administrator of German Property, seeks to have reversed a judgment of Roche J. declaring that the plaintiffs, a Swiss insurance company, are entitled to the sum of 1135*l.* 17*s.* 11*d.*, being the proceeds of a sale of precious stones shipped by George Ehni & Co., of Stuttgart, Germany, on the steamship *Osterdijk* in or about the month of February, 1916, consigned to G. Welsch & Co., of Lima, Peru, and that the proceeds of the sale were their property before January 10, 1920, which sum is now in the hands of the appellant Official.

The Administrator of German Property is in possession of this sum as the result of two orders of the Admiralty Division (in Prize) dated February 11, 1918, and April 24, 1925, respectively. By the first order the then President, purporting to act under the Reprisals Order of March 11, 1915, declared that the precious stones had an enemy origin and were enemy property and ordered them to be sold by the Marshal and the proceeds of sale thereof to remain in Court until the end of the war or pending further order.

The jewels were duly sold, and, by the second order of 1925, the President ordered the proceeds of the sale, the subject-matter of this action, to be handed to the Custodian of Enemy Property (German), that is, his successor in law, the Administrator, to be dealt with in accordance with the provisions of the Treaty of Versailles. Before this latter order was made in June, 1918, the original owner of the goods had given notice of abandonment to his insurers, the respondents, who, on June 21, 1918, paid him as for a total loss, the German owner ceding all his rights to the insurance company and the insurance company accepting the abandonment and taking over all the interests of the assured.

The documentary evidence shows that the respondent company, who were by s. 79 of the Marine Insurance Act, 1906, entitled to take the interest of the assured in whatever might remain of the subject-matter paid for, did in fact so exercise their right to take over such interest, whatever that interest was, and Roche J. has so found.

Once it is concluded that the interest had passed to the respondent company under s. 79 and that they became subrogated to the rights and remedies of the assured so that all the rights of Ehni had been assigned to them, the further question arises whether the chose so assigned by operation of law to the respondent company by the German was in possession or in action. The importance of this matter arises in the following way: by s. 6, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, no person shall by virtue of any assignment of any debt or other chose in action have any rights or remedies against the persons liable to pay, discharge or satisfy the debt or chose in action except in certain specified cases which do not here apply. If, therefore, the right claimed by the respondent company is a chose in action, s. 6, sub-s. 1, of the 1914 Act disentitles the company to claim, whereas if the claim is one for a chose in possession, he may be entitled to recover the same from the Administrator of German Property, under the Treaty of Peace Orders (Consolidated): see *The Oscar II.* (1) As Roche J. says

(1) [1921] 1 A. C. 467.

in his judgment: "If s. 6 be out of the way, there can be and was no dispute as to the title and right of the plaintiffs." On this crucial matter of the nature of the chose, Roche J. has not come to any final conclusion, for, in his view, s. 6, sub-s. 1, of the 1914 Act cannot be relied upon by the appellant at all, but, as for reasons which I will state, I have the misfortune to differ from him on this point, it does become essential here to consider whether the claim by the insurance company to this money is or is not a chose in action.

I have come to the conclusion in all the circumstances of this case that it is not possible to say that the interest taken over by the respondent company was anything more than a chose in action. At the time of the abandonment the goods had lawfully passed into the custody and possession of the Prize Court under the Reprisals Order. There was a power, even if they were not requisitioned for the use of His Majesty, to detain them and possibly to sell them. On the happening of this event I think that the interests of the assured, apart from the liability of the goods to be requisitioned or sold, as indeed they were, under Art. IV. of the Reprisals Order or vested in the Custodian under the Trading with the Enemy Act, 1914, and the Treaty of Peace Orders, became no more than a right, if not defeated by subsequent prerogative act of requisition, at the highest, some day to bring an action to recover the goods or their price, that is no more than "a bare right without any occupation or enjoyment": see 2 Blackstone, p. 396. The class of cases cited by Mr. Dickinson which decide that where a specific chattel is bailed and the owner can sell it and by the sale the general property passes to the buyer, subject to the special property of the bailee, both properties being choses in possession, cases in which distinction is made between special and general possession (such as *Franklin* v. *Neate* (1)), do not seem to be of any assistance in deciding the present problem. The German had, in my view, in all the circumstances of the operation of the orders of the Prize Court made under the Reprisals Order, no

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(1) 13 M. & W. 481.

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Slesser L.J.

more than a claim to the goods or their proceeds which must have been sued for in order to recover possession of them, and thus a chose in action and not in possession: see per Rigby L.J. in *May* v. *Lane.* (1) Although when the term "chose in action" occurs in a statute, the context may show that it is not to be taken in its widest meaning, I am unable to find any reason, despite Mr. Dickinson's argument on that head, why the term should not be given its ordinary connotation in s. 6, sub-s. 1, of the 1914 Act and, in these circumstances, the general definition of chose in action will apply as being things in action, as "when a man hath cause, or may bring an action for some duty due to him . . . . because they are things whereof a man is not possessed, but for recovery of them is driven to his action," to quote the well known definition in Termes de la Ley, described by Bayley J. in *Hewlins* v. *Shippam* (2) as a book of great antiquity and accuracy. The equally well known observations on this subject made by Fry L.J. in *Colonial Bank* v. *Whinney* (3) and by Lord Blackburn in the same case (4) clearly show how the two conditions of chose in action and chose in possession are antithetical and how there is no middle term. "Choses in possession are tangible, movable things": see Williams on Personal Property, 18th ed., p. 47. "Choses in possession are movable goods, of which their owner has actual possession and enjoyment, and which he can deliver over to another upon a gift or sale": Ibid. 29. "The term choses in action appears to have been applied to things, to recover or realise which, if wrongfully withheld, an action must have been brought; things, in respect of which a man had no actual possession or enjoyment, but a mere right enforceable by action": Ibid. 30. In my opinion, there is no doubt that the right to these goods or the produce of them which the respondents seek to enforce falls within the latter category of chose in action.

This conclusion, that the proceeds of the sale of these goods came to the respondents as no more than a chose in

(1) (1894) 64 L. J. (Q. B.) 236.
(2) (1826) 5 B. & C. 221, 229.
(3) 30 Ch. D. 261, 285.
(4) 11 App. Cas. 426, 434.

action, would conclude this case against the respondents under the statute of 1914, but, in deference to the learned judge, from whom I am differing, I must proceed to explain why, in my opinion, his view that the Crown cannot invoke s. 6 of the Act of 1914 is incorrect. The reasons why he comes to his conclusion are, first, because he is of opinion that the Act of Parliament does not reach or bind the Crown, and, secondly, that the Act is not part of the law to be applied to this property the subject of the Reprisals Order. He points out that the Act of 1914 does not mention the Crown. I do not quite agree, as s. 14, sub-s. 4, in terms provides that: " Nothing in this Act shall be construed as limiting the power of His Majesty by proclamation to prohibit any transaction which is not prohibited by this Act, or by licence to permit any transaction which is so prohibited," which appears to apply the Act to the Crown by implication if not expressly. But, however this may be, I do not think that it is possible, when this statute is rightly considered, to say that it seeks to bind the Crown at all. If anything, it is a statute made for the benefit of the King and his officers; by it he obtains powers to have property vested in the Crown and to forbid transactions injurious to the Crown which he might not otherwise possess at common law. In particular, under s. 6, it enables the officer of the Crown to resist a claim of an assignee of a chose in action which he could not otherwise resist, and so is a benefit and not a burden. As is said in Bacon's Abridgement, 7th ed., vol. vi, p. 462: " Where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the King, in such case the King shall not be bound, unless the statute is made by express words to extend to him." But such a rule assumes some deprivation of prerogatives—as to statutes made for his benefit it has even been said: " they shall be construed most beneficially for him ": see *Reniger* v. *Fogassa.* (1) It is further to be noted in support of the view that the Crown and its officers can rely upon the 1914 Act, that the Treaty of Peace Act, 1919, which

(1) (1549) Plowd. 1.

clearly bestows powers upon His Majesty, and the Orders made under that Act (which have been treated by the Courts as intra vires) in terms modify the actual provisions of the Trading with the Enemy Amendment Act, 1914, which, it is said, does not apply to the Crown: see for example Consolidated Order 1 (2.). I think, therefore, that the Crown, whether expressly named or not, not being bound but enabled, may rely on s. 6 of the 1914 Act.

The second reason given by the learned judge is that "it is not lightly to be presumed that the Legislature intends to bind the Court of Prize and that it would seem both inconvenient and unnatural to fetter the Prize Court by an Act passed for other purposes and without reference to any question of reprisals" is also, I think, untenable. The 1914 Act, by s. 6, makes certain assignments of choses in action, such as those under consideration, illegal, and action based upon them has, therefore, no validity. The assignment made between the German and the respondent company, on which the company must rely in this action, is nudum pactum and it appears to me irrelevant to consider whether this result is produced by operation of the Reprisals Order or in any other way. The relief here sought, is not asked from the Prize Court, but from the High Court of Justice who, if they recognize the assignment in the matter craved, would be giving legal validity to a void transaction. I agree that this appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *Solicitor to Clearing Office.*
Solicitors for respondents: *Thomas Cooper & Co.*

J. S. H.

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